77-91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

JAMES M. GAYLORD,

Petitioner,

v.

TACOMA SCHOOL DISTRICT No. 10, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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James M. Gaylord petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington sustaining petitioner's discharge from his position as a public high school teacher on the "sole basis" of his "status as a homosexual."

OPINIONS BELOW

The Washington Supreme Court issued two opinions. The first is reported at 85 Wn. 2d 348, and 535 P. 2d 804, and is set forth in the appendix, infra, at pp. 10-17a . The second is reported at 88 Wn. 2d 286, and 559 P. 2d 1340, and is set forth in the appendix, infra, at pp. 18a-39a. The two oral opinions of the Pierce County Superior Court are unreported, and are set forth in the appendix, infra, at pp. 40a-47a, 59a-64a. The first oral opinion was announced at the conclusion of the trial. The second was announced, without any additions to or changes in the trial record, after remand by the state supreme court. The two sets of findings of fact and conclusions of law of the Superior Court are also unreported, and are set out in the appendix, infra, at pp. 48a-56a, 67a-72a. *

JURISDICTION

The second decision of the Washington Supreme Court was filed on 20 January 1977, and a petition for rehearing was denied on 15 April 1977. Jurisdiction to review the state supreme court's judgment by writ of certiorari is conferred on this Court by 28 U.S.C. §1257(3).

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* References to the appendix, infra, will hereafter be made as "A-____".

QUESTIONS PRESENTED

1. May a public high school teacher who is a homosexual, or who publicly acknowledges that he is a homosexual, or who is assumed to have engaged in private homosexual acts, be fired on any of these grounds, or would such a firing amount to:

   a. an unwarranted deprivation of liberty; or
   b. an unwarranted invasion of privacy; or
   c. an unwarranted curtailment of freedom of expression; or
   d. a denial of equal protection of the laws?

2. Is the respondent's regulation permitting discharge of a public high school teacher for "immorality" overly broad or unduly vague, or has its application to petitioner resulted in a violation of his rights to privacy, or liberty, or freedom of expression, or equal protection of the laws?

3. Was petitioner's discharge based on assumptions or findings, unsupported by any evidence, that he had engaged in acts the occurrence of which was never alleged, and was he, thereby, deprived of liberty and property without due process of law?

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Revised Code of Washington §28A.70.160 (as of the time of petitioner's discharge and trial):

> Revocation of authority to teach. Any certificate to teach authorized under the provisions of this chapter or rules and regulations promulgated thereunder may be revoked by the authority authorized to grant the same upon complaint of any school district superintendent, or county or intermediate district superintendent for immorality, violation of written contract, intemperance, crime against the law of the state, or any unprofessional conduct, after the person whose certificate is in question has been given an opportunity to be heard.

Tacoma School District No. 10, Policy No. 4119:

SEPARATION

The Board of Education considers the following as justifiable causes for release or dismissal of school employees:

1. Incompetence
2. Physical or mental incapability as shown by competent medical evidence

3. Willful or persistent violation of school laws, Board of Education regulations or administrative policies
4. Inability to work with other members of the staff
5. Immorality
6. Willful or persistent neglect of duty
7. Discontinuance of the position if absorption into another position is impossible....

STATEMENT OF THE CASE

The basic facts are not in dispute. Until November 1972, petitioner was a public school teacher at Wilson High School for nearly thirteen years and was, according to all witnesses, an excellent teacher. A-41a-42a. The last evaluation of his work stated: "Mr. Gaylord continues his high standards and teaching performance. He is both a student and teacher in his field" (St. 38).[1] He was generally

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1 "St." references are to the statement of facts in the record on appeal below. The statement includes a verbatim report of the testimony.

regarded by his students as an excellent teacher (St. 120). [2]

On 24 October 1972 the vice principal of Wilson High School came to petitioner's home and confronted him with an allegation that he was a homosexual. Petitioner acknowledged that he was (St. 22).

On 21 November 1972 a letter was sent to petitioner notifying him that probable cause for his discharge had been found by the school board. The letter read, in part:

> The specific probable cause for your discharge is that you have admitted occupying a public status that is incompatible with the conduct required by teachers in this district, specifically, that you have admitted being a publicly known homosexual.
> St. 230.

Petitioner subsequently learned that the board's action was based solely on Tacoma School District No. 10 Policy No. 4119 (5) which makes "immorality" a cause for discharge.

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2 Petitioner graduated Phi Beta Kappa from the University of Washington and was selected "Outstanding Senior" in the political science department. He subsequently received a masters degree in librarianship. (St. 77-78)

Petitioner's discharge was upheld at an administrative hearing, convened at his request. Thereafter, he sought a de novo judicial hearing in Pierce County Superior Court, as authorized by Washington law. Testimony at the trial about petitioner's conduct and performance as a teacher was uniformly favorable. A-41a-42a. Even the vice principal who initiated the action which led to his firing characterized him as "one of the best teachers in our social studies department." (St. 27)

None of petitioner's close friends among the faculty or among his former students knew, until his discharge, that he was a homosexual. (St. 130,132) Some current students, who respected him as a teacher and signed up for his classes--all of which were electives--had speculated that he might be homosexual. (St. 93, 121)

The fact that petitioner was a homosexual came to the attention of the school administration in the following way. About a year before petitioner was fired, a student asked to talk with him. (St. 87) They talked about a variety of things including, briefly, homosexuality. (St. 7) Apparently, the student was a homosexual and had been told by someone outside the school that petitioner was someone he could talk to. (St. 4, 87) Petitioner did not tell the student he was a homosexual. (St. 7)

The student was not in any of petitioner's classes and this was the only conversation that occurred between them. (St. 90)

About a year later, the vice principal learned from the student of his belief that petitioner was a homosexual. (St. 8, 21) There was never any criticism or complaint about petitioner's conduct in relation to this or any other student.

The only factual dispute at trial concerned the possible effect of knowledge that petitioner was a homosexual. The vice principal believed the presence of a teacher known to be a homosexual "Would be an extremely disruptive type of thing" (St. 26) but conceded on cross-examination that his belief was speculation. (St. 29) The principal gave similar testimony. On Cross-examination, he acknowledged that petitioner had been an excellent teacher until the day he was fired and that his belief concerning future problems was speculation. (St. 36)

Petitioner testified that he had been homosexual during all of the years he had taught and that he believed his teaching ability would be unimpaired by public knowledge of his homosexuality. In addition to favorable parent, teacher, and student testimony (St. 72,72,174,175), petitioner called three experts: two psychiatrists and an educational psychologist.

The two psychiatrists had met individually with petitioner and evaluated him prior to trial. Both testified there

would be no risk of harm to students if petitioner were allowed to continue teaching. One described petitioner as a person who projected an academic role model, not a sexual role model. (St. 102) The second said, "[H]e impressed me as an intelligent man, a kindly man, sensitive man, who behaved not particularly different than anybody else." (St. 191)

The educational psychologist had served as a consultant to virtually every school district in Western Washington, including the Tacoma School District. (St. 196) He testified that he had observed homosexuals teaching in the classroom and that many of them were excellent teachers. (St. 200) He testified that a teacher like petitioner, who had taught almost thirteen years with an excellent record and who had had no trouble controlling his classes,would not have trouble in the future, even if the fact of his homosexuality were to become known. (St. 206) He testified that he would not hesitate to hire petitioner if he were an administrator (St. 205), and that failure to retain petitioner, in light of his excellent teaching performance, would impair the teaching environment at Wilson High School. (St. 207) The school board did not present any independent testimony, expert or lay, to the contrary.

At the conclusion of trial, the court found:

> There is no allegation or evidence that James Gaylord has ever

> committed any overt acts of homosexuality. The sole basis for his discharge is James Gaylord's status as a homosexual. (A-50a).

Relying on a statute which it construed as requiring that more weight be given to the testimony of school officials than to that of other witnesses, it concluded that retention of petitioner would impair the learning environment at the school, and upheld his discharge. (A-52a-55a).

The state supreme court, on appeal, held the trial court's manner of weighing the evidence erroneous and remanded for entry of new findings of fact. Without receiving any additional evidence, the trial court entered new findings, including a finding that

> from [petitioner's] own testimony it is unquestioned that homosexual acts were participated in by him, although there was no evidence of any overt acts having been committed. (A-68a).

After reargument in the state supreme court, the judgment of the trial court was affirmed. The majority reasoned that an individual who admitted to being a homosexual could be presumed to have engaged in homosexual acts. It held that homosexuality was "immoral" and concluded that petitioner's teaching would be

adversely affected because other teachers, parents, and students might object to his presence.

Justice James M. Dolliver, in dissent, saw "not a shred of evidence" to support a finding of homosexual activity (A-33a). He characterized the projection that problems would arise if petitioner was retained as conjecture, and concluded that petitioner's dismissal was without due process.

All of the federal constitutional claims raised by this petition were raised in the trial court and in the state supreme court. They were first raised in a motion for summary judgment prior to trial; they were raised again during trial, and the trial court entered conclusions of law as to each claim. On remand, petitioner proposed new conclusions of law and filed a memorandum renewing all of his federal constitutional claims. On both appeals to the state supreme court, all of petitioner's federal constitutional claims were raised in the briefs.

REASONS FOR GRANTING THE WRIT

If petitioner had been hetereosexual, he would not have been fired--for it was conceded he had been an excellent teacher for nearly thirteen years. The school board did not object to anything petitioner had <u>done</u>; it objected to what he <u>was</u>.

This Court has never given plenary

consideration to the case of a person discharged from public employment for homosexuality, although ten years ago, in Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967), it held that a homosexual alien could be excluded from the country. The majority in Boutilier proceeded on the assumption that homosexuality was a psychiatric disorder and Public Health Service doctors had found and certified that Boutilier was afflicted by a psychiatric disorder. There were, at the time, few lower court opinions discussing the constitutional implications of discrimination on the basis of sexual orientation, and none were referred to by the Court.

In the last ten years, much has changed. The American Psychiatric Association no longer regards homosexuality as a psychiatric disorder. 9 Psychiatric News 1 (1974). Lower courts, including the United States Court of Appeals for the District of Columbia in Norton v. Macy, 417 F. 2d 1161 (1969), and the California Supreme Court in Morrison v. State Board of Education, 1 Cal. 3d 214, 461 P. 2d 375, 82 Cal. Rptr. 175 (1969), have held that homosexuality is not alone a sufficient basis for discharge of a public employee. See also, Acanfora v. Board of Education of Montgomery County, 359 F. Supp. 843 (D. Md. 1973), aff'd on other grds, 491 F. 2d 498 (4th Cir.), cert. denied, 419 U.S. 836 (1974); Society for Individual Rights, Inc., v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973); Gayer v. Laird, 332 F. Supp. 169 (D.D.C. 1971); Burton v. Cascade School District Union High School No. 5, 353 F. Supp. 254 (D.

Ore. 1973), aff'd, 512 F. 2d 850 (9th Cir. 1975).

The state of Massachusetts, and many cities, including Minneapolis, San Francisco and Seattle, have enacted legislation prohibiting discrimination against homosexuals, including employment discrimination.

The United States Civil Service Commission, reflecting the rulings of lower courts, has issued guidelines which provide that an individual cannot be found "unsuitable for Federal employment solely because that person is a homosexual or has engaged in homosexual acts...a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarassment to the Federal service..."[3]

Under those guidelines and lower court opinions, petitioner could not, on the facts of this case, be denied federal employment. He has, however, been terminated from state employment. The constitutionality of that termination is presented in sharp focus, and on a well-developed record, by this case.

1. Petitioner's Rights to Privacy, Liberty and Equal Protection Have Been Violated.

3 5 CFR Part 73, Section 731.202(b), 2 Employment Practices Guide (CCH) ¶5339.

Alluding to the substantive right to liberty and the right to privacy, Mr. Justice Brandeis observed:

> The makers of our Constitution... sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone--the most comprehensive of the rights of man and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion). The Fourteenth Amendment's prohibition against deprivation of liberty without due process "affords not only a procedural guarantee... but likewise protects substantive aspects of liberty against unconstitutional restriction by the State." Kelley v. Johnson, 425 U.S. 238, 244 (1976). Griswold v. Connecticut, 381 U.S. 479 (1965), described the right to be let alone as a zone of privacy into which the government may not intrude without an important reason.

At the center of the zone of privacy is the individual's freedom of thought. As the Court concluded in Stanley v. Georgia, 394 U.S. 557, 565-566 (1969): "the assertion that the State has the right to control the moral content of a person's thoughts...is wholly inconsistent with the philosophy of the First Amendment". Stanley acknowledged the right to possess even legally obscene materials

in the privacy of one's home.

The freedom to engage in private sexual activity, both within marriage as in Griswold, and outside marriage as in Eisenstadt v. Baird, 405 U.S. 438 (1972), and Carey v. Population Services International, _____ U.S. _____, U.S. Law Week 4601 (June 9, 1977), is within the protected zone of privacy, as is the right to terminate a pregnancy within the first trimester.[4] Roe v. Wade, 410 U.S. 113 (1973). Similarly, private conduct such as contraception and abortion is condemned by many people as "immoral." But moral questions and constitutional questions have quite properly been regarded by this Court as independent.

The substantive liberty and privacy interests at issue here relate initially to petitioner's freedom of thought--his freedom to be a homosexual without incurring governmental sanctions--and secondarily to the freedom to engage in private homosexual activity.[5] The state

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4 See also, Mindel v. United States Civil Service Commission, 312 F. Supp. 485, 487 (N.D. Cal. 1970), in which the court held that extramarital heterosexual cohabitation which was "discreet, not notorious or scandalous," was within the plaintiff's right to privacy and that government could not condition employment on the waiver of that right.

5 Although there was no evidence that

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supreme court was satisfied that there were sufficient grounds for making such thought and assumed private conduct a basis for discharge.

The state supreme court mentioned three objections to the retention of a teacher who was homosexual or who engaged in private homosexual conduct: (1) certain teachers and at least one student objected; (2) the school administration thought that retention of a homosexual would create problems; and (3) "students could treat the retention of [a homosexual]... as indicating adult approval of his homosexuality." (A-30a, 88 Wn. 2d at 298)

The fact that some people would object to petitioner's retention is significant only to the extent that such people have a legally recognized right to object.[6] There are, unfortunately, those who object to the presence of teachers who are black, white, Catholic, or athiest. But so long as such teachers do their jobs well, they cannot be fired because some people find

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petitioner had ever engaged in any sexual activity, the state supreme court took the position that if one admitted to being a homosexual, it would be presumed, absent evidence to the contrary, that sexual activity occurred. As counsel will argue in section 3 infra, on the facts of this case, that presumption was constitutionally impermissible.

6 Even though they might have no right to object, those who might wish to avoid
(FN 6 Continued on Next Page)

what they are objectionable--any more than speakers may be silenced because some people find what they say objectionable. Cf. Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969).

The undifferentiated apprehension that petitioner's retention would create problems is no more sufficient to overcome petitioner's right to liberty or privacy than was the "undifferentiated fear or apprehension of disturbance...enough to overcome the right of freedom of expression" of a public school student in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508 (1969). Both the principal and the vice-principal conceded on cross-examination that their concerns about future problems were merely speculation. (St. 29, 36) Justice Dolliver, dissenting in the state supreme court, observed:

> At the trial, a variety of witnesses speculated on the effect that Gaylord's homosexuality might have on his effectiveness in the classroom. The speculation varied considerably. Certainly there were witnesses who testified that Gaylord's effectiveness would be damaged. There were also those who testified to the contrary. As a

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petitioner's classes would not be obliged to take them because all of petitioner's classes are electives. (St. 93)

> result, the trial court found that "the continued employment of appellant after he became known as a homosexual would result, had he not been discharged, in confusion, suspicion, fear, expressed parental concern and pressure upon the administration." The question this court must ask is whether a finding of detrimental effect can be made on the basis of conjecture alone. (A-36a,88 Wn. 2d at 304)

Finally, retention of a homosexual no more indicates approval of homosexuality than would retention of a Communist, or a Quaker, or a vegatarian indicate approval of Communism, or Quakerism, or vegetarianism. Cf. Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967).

Petitioner submits that the objections identified by the state supreme court are inadequate to outweigh petitioner's interests in privacy and liberty or, as Justice Dolliver put it, to justify "the dismissal of a teacher who has a flawless record of excellence in his classroom performance" over nearly thirteen years. (A-37a)

The rights to privacy and liberty are meaningless if they can be claimed only by those who think and act in accordance with the conventions and wishes of the majority. The Supreme Court of Washington failed to recognize that the central purpose of those rights is to insulate unpopular minorities from the tyranny of the

majority. As Circuit Judge Lumbard noted, in a case involving termination of a public school teacher because of "her immorality of being a practicing homosexual":

> If community resentment was a legitimate factor to consider, few Southern school districts would have been integrated. One of the major purposes of the Constitution is to protect individuals from the tyranny of the majority. That purpose would be completely subverted if we allowed the feelings of the majority to determine the remedies available to a member of a minority group who has been the victim of unconstitutional actions. Burton v. Cascade School Dist. Union High School No. 5, 512 F. 2d 850, 855, 856 (9th Cir. 1975) (dissenting opinion).

See, to the same effect, Norton v. Macy, 417 F. 2d 1161, 1165 (D.C. Cir. 1969):

> [T]he notion that it could be an appropriate function of [government] to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy and diversity.

Norton held that homosexuality is not a

sufficient basis for the discharge of a federal employee.[7]

2. Petitioner has been Judged by an Unconstitutionally Broad and Vague Standard and his Freedom of Expression has been Curtailed

Petitioner was fired under a school district policy that makes "immorality" a ground for discharge. The majority in the state supreme court conceded that "'[i]mmorality' as a ground for teacher discharge would be unconstitutionally vague if not coupled with resulting actual or prospective adverse performance as a teacher." (A-22a, 88 W . 2d at 290) It purported to find evidence of prospective adverse teaching performance, as appears from the preceding section, not in the prospect that petitioner would teach differently than he had in the past--and he had always been regarded as an excellent teacher--but rather in the prospect that others would find his presence objectionable.

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7 See also, In re Labady, 326 F. Supp. 924, 927-928 (S.D.N.Y. 1971), in which then District Judge Mansfield concluded:

> private conduct which is not harmful to others, even though it may violate the personal moral code of most of us, does not violate public morality which is the only proper concern of [government].

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It was therefore essential to the holding that others would object. That holding gives great power to teachers, parents, and students, with no standards to limit or guide the exercise of that power. In essence, the court below considered "immoral" anything that a sufficient number of teachers, parents, students, or others would find objectionable. Citing religious and sociological sources, it concluded that

> [h]omosexuality is widely condemned as immoral and was so condemned as immoral during biblical times. (A-29a , 88 Wn.2d at 295)

Petitioner contends that the judicial standard "widely condemned as immoral" is no less vague than the regulatory standard "immoral," is unconstitutionally broad,[8]

(FN 7 Continued from Previous Page)

> To hold otherwise would be to encourage government inquisition into an applicant's purely personal private temperament and habits . . . even though such attitudes or conduct would not harm others.

In Labady the court held that purely private homosexual conduct is not a sufficient basis for refusing an application for naturalization.

8 A law is unconstitutionally broad if it "sweeps within its prohibitions what may not be punished under the First and Fourteenth

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and in its application to him has curtailed freedom of expression.

A. First Amendment Overbreadth

Under that standard those who differ from the conventional morality must either recant their differences or, at least, keep them secret. The courts below conceded that petitioner's teaching performance had been unaffected by his homosexuality until the day of his discharge. Accordingly, the courts could not find that his teaching would be affected by his homosexuality, and were forced to find that his teaching might be affected by public knowledge of his homosexuality. But because public knowledge of his homosexuality resulted solely from petitioner's acknowledgement of homosexuality when questioned by his superior, the court's decision effectively punishes petitioner for speech, or at least for failure to remain silent. In short, the state supreme court ruled that petitioner could be discharged for communicating the fact of his homosexuality to a superior. (A-29a,88 Wn.2d at 297) His firing was justified because he had admitted that he was a homosexual. Had he kept that fact a secret, he could have remained a homosexual without incurring any sanction.

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Amendments." Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); See also Broadrick v. Oklahoma, 413 U.S. 601 (1973); Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967).

There was no claim that petitioner had communicated the fact of his homosexuality to anyone other than his superiors, and only at their request. Had they kept that fact to themselves, petitioner's homosexuality would not have become public knowledge and his superiors could not then have claimed that public knowledge would impair his teaching. In short, petitioner lost his job not because of conduct, or because of public statements, but solely because of a private communication to his superiors. Compare, Acanfora v. Board of Education of Montgomery County, supra (alternatively holding that a public school teacher could not be disciplined even for publicly discussing his homosexuality).

B. Vagueness

Petitioner contends that the judicial standard "widely condemned as immoral" is unduly vague because it does nothing more than shift the locus of discretion from the school board to some larger and undefined group of people without supplying any standards for the exercise of their discretion.[9] "The concept of morality

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9 Although petitioner was fired for immorality, and for assumed homosexual acts, it is important to note that he was never charged with any crime, or with any homosexual acts that would also be criminal acts. Accordingly, this Court's summary affirmance in Doe v. Commonwealth's Attorney, 425 U.S. 901, rehearing denied, 425 U.S. 985 (1976), even assuming it

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has occupied men of extraordinary intelligence for centuries, without notable progres . . . toward a common understanding." Gesicki v. Oswald, 336 F.Supp. 371, 374 (S.D.N.Y. 3-judge court 1971), aff'd mem., 406 U.S. 913 (1972). Although most people know how to use words like "immoral" or "beautiful," and in that limited sense know what they mean, there is no general agreement about what is immoral or beautiful. Immorality, like beauty, is largely in the eye of the beholder. See Musser v. Utah, 333 U.S. 95 (1948) ("injurious to public morals").

The standard "widely condemned as immoral" raises all of the familiar problems of vague laws. How, for example, is a teacher who wishes to have an abortion to know whether she will be subject to firing for her wish, or for the abortion itself, or for the future revelation of the fact that she had an abortion? Must she guess whether the school administration will think abortion so widely condemned as immoral as to be a basis for firing? How is the administration to resolve such a question? Is a teacher to be deterred from having an abortion, or from speaking about it, by the fear that it might be viewed as cause for firing? And if we

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retains any authoritative value, see, Mandel v. Bradley, ___ U.S. ___, 45 U.S. Law Week 4701 (June 16, 1977), and Carey v. Population Services International, supra, is wholly irrelevant to the issues here and in no way precludes relief for petitioner.

have an abiding confidence that no teacher will actually be fired for having an abortion or speaking about one--even though many people condemn abortion as immoral and would object to having their children taught by a woman who admitted publicly to having had one--does such confidence rest on anything more than a realization that the standard "widely condemned as immoral" will be applied in a discriminatory manner?

Petitioner contends that he was not given fair warning that he could be fired for directly communicating the fact that he is a homosexual to his superiors or for indirectly allowing that fact to become widely known. He contends that there are widely disparate views about the morality of homosexuality,[10] and that to allow school administrators to choose among such views in the manner the state supreme court allowed entails a breadth of discretion which necessarily results in arbitrary and discriminatory administration. Burton v. Cascade School District Union High School No. 5, 353 F. Supp. 254 (D. Ore. 1973), aff'd, 512 F.2d 850 (9th Cir. 1975). In Burton the court held the term "immoral" to be unduly vague and awarded damages to a homosexual public school teacher who had been fired under that standard.

Finally, petitioner contends that the standard approved below deters teachers from

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10 See, e.g., In re Labady, 326 F.Supp. 924, 930 (S.D.N.Y. 1971).

expressing unpopular views because the very unpopularity of such views, and public reaction to them, may be taken to justify the firing of those who express them.

3. Petitioner Has Been Deprived of Liberty and Property Without Due Process

As a public high school teacher who, under Revised Code of Washington § 28A.58.100, could only be fired for sufficient cause, petitioner had an interest in his job which could not be terminated without due process. Board of Regents v. Roth, 408 U.S. 564 (1972). To be fired for engaging in prohibited activity, he would have to be charged with engaging in such activity, and the finding that such activity occurred would have to be supported by evidence in the record. Cf. De Jonge v. Oregon, 299 U.S. 353 (1937); Thompson v. Louisville, 362 U.S. 199 (1960).

After petitioner's trial in superior court, and before the first decision of the state supreme court, the trial judge entered the following finding of fact:

> There is no allegation or evidence that James Gaylord has ever committed any overt acts of homosexuality. The sole basis for his discharge is James Gaylord's status as a homosexual. (A-8a,85 Wn. 2d at 355)

After remand and on the identical record --for no new evidence was received--the trial judge entered the following finding of fact:

> from appellant's own testimony it is unquestioned that homosexual acts were participated in by him, although there was no evidence of any overt acts having been committed. (A-25a,88 Wn.2d at 293) [Emphasis added.]

The state supreme court took this to be a finding that petitioner had engaged in homosexual acts although, read literally, it is only a finding that petitioner did not affirmatively dispute that he had engaged in such acts.

The majority in the state supreme court simply ignored the fact that petitioner was never confronted with an allegation that he had engaged in sexual acts of any kind. It held that if an individual admits to being a homosexual, it will be presumed, absent testimony to the contrary, that the individual engages in homosexual acts. (A-25a-28a,88 Wn.2d 293-96) There is nothing in the record, or in previous Washington statutory or case law, that would have put petitioner on notice that such a presumption might be invoked against him.

Referring to the prohibited acts assumed by the majority, Justice Dolliver responded in dissent: "There is not a shred of evidence in the record that Mr. Gaylord participated in any of the acts stated above." (A-33a, 88 Wn.2d at 301) Remarking on the novelty of the majority's approach, he continued:

> Mr. Gaylord was never at any time accused of performing any "homosexual

> acts." Yet because of his declared status, he must assume the burden of proving he did not commit certain illegal or immoral acts which have at no time been referred to or mentioned, much less described, by the school board. Presumably under this reasoning, an unmarried male who declares himself to be heterosexual will be held to have engaged in "illegal or immoral acts." (A-34a,88 Wn.2d at 302)

Petitioner does not contend that it would be constitutionally impermissible to establish a rebuttable presumption that one who admits to being a homosexual (or a heterosexual) has engaged in private sexual activity. But if such a presumption is to be applied, it cannot simply be announced ex post facto by an appellate court and be applied to a litigant who had no prior notice of its establishment. Cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

Without the challenged presumption, the majority's conclusion that petitioner engaged in sexual activity has no evidentiary basis. Petitioner has been fired without due process on "a charge not made," De Jonge v. Oregon, 299 U.S. at 362, and "without evidence of his guilt." Thompson v. Louisville, 362 U.S. at 206.[11]

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11 Although Thompson v. Louisville was a criminal case, the consequence at issue there, a $20 fine, was trivial by comparison
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CONCLUSION

For nearly thirteen years, James Gaylord was an excellent social studies teacher. With this case, he has become a social studies lesson--a lesson that one who is different from the majority of Americans, although the difference is in an aspect of life that is distinctively private, can be deprived, because of that difference, of a public position in which his performance has been consistently excellent. Only this Court can correct that lesson. It should grant the petition for a writ of certiorari.

(FN 11 Continued from Previous Page)

to the consequence at issue here. As this Court observed in Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967), "[w]hether or not loss of public employment constitutes punishment . . . there can be no doubt that the repressive impact of the threat of discharge will be no less direct or substantial." Id. at 607, n. 11. A fortiori, the impact of discharge itself will be no less direct or substantial.

Respectfully submitted,

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APPENDIX

FIRST OPINION OF THE SUPREME COURT OF WASHINGTON

[No. 43482. En Banc. May 15, 1975.]

JAMES M. GAYLORD, *Appellant*, v. TACOMA SCHOOL DISTRICT No. 10 *et al*, *Respondents*.

[1] Schools and School Districts — Teachers — Discharge — Sufficient Cause—What Constitutes—Conduct. A teacher's conduct constitutes "sufficient cause" for discharge, as that term is used in RCW 28A.58.100, when such conduct affects his efficiency.

[See Ann. 4 A.L.R.3d 1090; 68 Am. Jur. 2d, Schools § 162.]

[2] Schools and School Districts—Teachers—Discharge—Judicial Review—Burden of Proof. In a superior court action to review the discharge of a teacher, a school district must meet the same burden of proof which applies in the original hearing under RCW 28A.58.450, i.e., showing sufficient cause for the discharge by a preponderance of the evidence.

[3] Schools and School Districts—Teachers—Discharge—Judicial Review—Consideration of Educators' Views. The provision of RCW 28A.58.1011 requiring special consideration of educators' views applies only to the adoption of rules on pupil conduct under RCW 28A.58.101(2), and does not affect the burden of proof in a hearing on a teacher's discharge.

STAFFORD, C.J., and FINLEY, WRIGHT, and HOROWITZ, JJ., concur by separate opinion; RINGOLD, J. Pro Tem., dissents in part by separate opinion; HUNTER and HAMILTON, JJ., dissent by separate opinion; ROSELLINI, J., did not participate in the disposition of this case.

Appeal from a judgment of the Superior Court for Pierce County, No. 215450, James V. Ramsdell, J., entered January 2, 1974. *Reversed.*

Action to review the discharge of a teacher and action for damages and reinstatement. The plaintiff appeals from a judgment in favor of the defendants.

Christopher E. Young and *William R. Creech* (of *Peterson, Bracelin, Creech & Young*), for appellant.

Ronald L. Hendry, Prosecuting Attorney, and *Richard A. Monaghan* and *Philip Brandt, Deputies*, for respondents.

UTTER, J.—James Gaylord was dismissed from his position as a teacher in Tacoma School District No. 10 when the district learned he was a homosexual. He appealed the district's action to superior court pursuant to RCW 28A.58.480, and also filed a complaint for damages and reinstatement. The court upheld the action of the school district and declined to reinstate him. He appeals.

[1] One of the pivotal issues at the trial of this case was whether appellant was discharged for "sufficient cause" pursuant to RCW 28A.58.100, which provides in part: "Every board of directors, unless otherwise specially provided by law, shall: (1) Employ for not more than one year, and for sufficient cause discharge all certificated and noncertificated employees . . ." The term "sufficient cause" was early defined as conduct which would affect the teacher's efficiency. *Browne v. Gear*, 21 Wash. 147, 57 P. 359 (1899); *Denton v. South Kitsap School Dist. 402*, 10 Wn. App. 69, 516 P.2d 1080 (1973).

Mr. Gaylord contends he was an excellent teacher up until the day he was discharged despite the alleged public knowledge of his status as a homosexual. He stresses the trial court's finding of fact that "There is no allegation or evidence that James Gaylord has ever committed any overt acts of homosexuality. The sole basis for his discharge is James Gaylord's status as a homosexual." He argues to this court that expert testimony showed overwhelmingly that, even if knowledge of his status as a homosexual became public, he would be able to function efficiently as a teacher without risk of harm to the school or to the pupils. The school district, on the other hand, presented testimony at trial by its administrative staff that when knowledge of appellant's status as a homosexual became known to the students and their parents, the resulting complaints would

affect appellant's teaching efficiency and injure the school.

This crucial question of fact was resolved in favor of the school district by the trial judge. He found the public knowledge of Gaylord's status would "impair the optimum learning atmosphere in the classroom." This finding, however, was based on conclusion of law No 3, in which the judge held he had to give special emphasis to the school administrators' testimony inasmuch as "[p]ursuant to RCW 28A.58.1011, this court is required to give the highest consideration to the judgment of the qualified, certified educators regarding conditions necessary to maintain the optimum learning atmosphere." The court's oral opinion reflects the significance of this holding: "In the court's opinion under the evidence, and taking the evidence of the people who have to live with this, who seek under the statute to create the optimum learning atmosphere, the Court is going to rule for the Respondent. I feel I have no choice. I can say this, that I expect and I hope that this matter is taken further and that we have a clarification under our own state law on this one question. I don't think it's open and shut, and I think this would be a good vehicle for having that question tested."

[2, 3] The burden of proof in this case should be placed upon the district. Its decision to discharge must be based "solely upon the cause or causes for discharge specified in the notice of probable cause . . . and established by a preponderance of evidence at the hearing . . ." RCW 28A.58.450. The interpretation of RCW 28A.58.101(1) made by the trial court would lessen the burden of proof required of the district by law. The language of RCW 28A.58.101(1) does not support the interpretation urged by respondent and made by the trial court. RCW 28A.58.101 provides:

> Every board of directors, unless otherwise specifically provided by law, shall:
>
> (1) Enforce the rules and regulations prescribed by the superintendent of public instruction and the state board of education for the government of schools, pupils, and certificated employees.

(2) Adopt and make available to each pupil and parent in the district reasonable written rules and regulations regarding pupil conduct, discipline, and rights. Such rules and regulations shall not be inconsistent with law or the rules and regulations of the superintendent of public instruction or the state board of education and shall include such substantive and procedural due process guarantees as prescribed by the state board of education . . .

(3) Suspend, expel, or discipline pupils in accordance with RCW 28A.04.132.

RCW 28A.58.1011 in turn provides:

The rules adopted pursuant to RCW 28A.58.101 shall be interpreted to insure that the optimum learning atmosphere of the classroom is maintained, and that the highest consideration is given to the judgment of qualified certificated educators regarding conditions necessary to maintain the optimum learning atmosphere.

By its own terms RCW 28A.58.1011 only applies to those situations where rules are *adopted* pursuant to RCW 28A.58.101. The only portion of the latter statute requiring *adoption* of rules is subsection (2), relating to pupil conduct, discipline and rights. Subsection (1), regarding rules and regulations governing certificated employees, deals with the enforcement of those rules and regulations enacted by the Superintendent of Public Instruction. The rules dealing with certificated personnel, such as appellant, are not adopted pursuant to RCW 28A.58.101, and the trial court's application of the mandate of RCW 28A.58.101 regarding weight to be given the testimony of qualified certificated educators was therefore inappropriate.

This case is remanded to the trial court to enter findings of fact based upon the application of the proper statutory burden of proof of the district.

WRIGHT, BRACHTENBACH, and HOROWITZ, JJ., concur.

STAFFORD, C.J. (concurring specially)—The trial court's finding that the teacher's status would "impair the optimum learning atmosphere in the classroom" is basic to an

affirmance of the district's action. The finding is necessary for a determination of the issue on appeal as well. In resolving the factual dispute that gave rise to this critical finding, the trial court relied on RCW 28A.58.1011 and gave added weight to the school administrators' testimony. As the majority points out, the trial court misinterpreted the requirements of RCW 28A.58.1011.

The weight to be attached to the testimony of witnesses is a judgmental matter peculiarly within the province of the trier of fact. Such judgmental process is neither changed nor controlled by RCW 28A.58.1011. In the final analysis, the district must establish its case by a preponderance of the evidence. RCW 28A.58.450. Whether the trial court will reach the same or a contrary result, after an unfettered evaluation of the testimony, remains to be seen.

Without question, there are other matters of considerable interest that await eventual resolution. I note the desire of the dissent to meet them now. But, the nature of the potential issues involved and the manner of their presentation can be considered in a proper light only after the trial court has reevaluated the testimony and entered its findings of fact. An attempt to resolve these tempting potential issues before the trial court has fulfilled its duty will short-circuit the judicial process.

The cause should be remanded for reconsideration of the testimony of the several witnesses after properly weighing it, unfettered by RCW 28A.58.1011. The trial court should thereafter enter findings of fact based upon the burden of proof required by RCW 28A.58.450.

FINLEY, WRIGHT, and HOROWITZ, JJ., concur with STAFFORD, C.J.

RINGOLD, J.* (concurring in part and dissenting in part)—I agree that RCW 28A.58.1011 was misinterpreted by the trial court.

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*Justice Ringold is serving as a justice pro tempore of the Supreme Court pursuant to Const. art. 4, § 2(a) (amendment 38).

I disagree with the majority as to the nature of the remand.

James Gaylord attended the University of Washington on a scholarship and was named "outstanding senior" in the political science department. He graduated in 1956 with a Phi Beta Kappa award. He began teaching at Wilson High School in Tacoma in 1960. In the academic year 1967-68, while on a sabbatical leave, he returned to the University of Washington and earned a master's degree in librarianship.

By letter dated November 21, 1972, he was notified that probable cause for his discharge had been found by the Board of Directors of the school district, the letter in part stating as follows:

> The specific probable cause for your discharge is that you have admitted occupying a public status that is incompatible with the conduct required of teachers in this district. Specifically, that you have admitted being a publicly known homosexual.

The plaintiff requested a hearing before the Board of Directors which was held on December 19, 1972. The board made the following findings and conclusions:

I.

That James E. Gaylord is a teacher in Tacoma School District No. 10, and has been for a number of years.

II.

That James E. Gaylord, by stipulation of his counsel and by his own admission is a homosexual.

III.

That James E. Gaylord made contact with and imparted information as to his homosexuality to one Frank Rivers, a resident of Tacoma, Pierce County, Washington.

IV.

That knowledge of Mr. Gaylord's homosexual condition was obtained by one Kim Balcom, a student in the Tacoma School District No. 10.

V.

That therefore James E. Gaylord has made knowledge of his homosexuality public.

From the Findings set forth above, the Board has made the following conclusions:

I.

That the Board has jurisdiction of the subject matter of the hearing and of the person of James E. Gaylord.

II.

That being a publicly known homosexual is a (sic) moral conduct constituting just cause for dismissal as a teacher from Tacoma School District No. 10.

III.

That James E. Gaylord should be dismissed as a teacher from Tacoma School District No. 10.

Therefore, it is the decision of the undersigned members of the Board of Directors of Tacoma School District No. 10 that James E. Gaylord should be and hereby is, discharged from his duties as a teacher of Tacoma School District No. 10 effective with the close of business December 21, 1972.

As required by state law, the defendant board had adopted written policies for discharge. It was stipulated that the plaintiff was discharged under policy 4119 reading in part:

> The Board of Education considers the following as justifiable causes for release or dismissal of school employees . . . (5) immorality . . .

The plaintiff appealed to the Superior Court, pursuant to RCW 28A.88.015 for a trial de novo.

After 3 days of trial, the trial court entered its findings of fact:

I.

James Gaylord was a teacher at Wilson High School in Tacoma School District No. 10 for twelve full years, and for part of a thirteenth year up to December 21, 1972.

II.

During his entire teaching career at Wilson High School James Gaylord received excellent evaluations.

III.

On October 24, 1972 a statement was prepared by one Kim Balcolm, a former student at Wilson High School, and was given to Wilson High School officials. This statement indicated that Kim Balcolm believed James Gaylord to be homosexual. On the same date this letter was shown to James Gaylord by Wilson High School Vice-Principal, Jack Beer, and James Gaylord stated to Jack

Beer that he was homosexual, and that "he had come out of the closet". On November 21, 1972, James Gaylord was notified by letter that the Board of Directors of Tacoma School District No. 10 had found probable cause for his discharge from his duties as a teacher on the basis that he occupied a public status that was incompatible with the conduct required of teachers in Tacoma, specifically the status of being a publicly known homosexual.

IV.

On December 21, 1972, a hearing was held before three members of the Tacoma School District No. 10 Board of Directors, and said Board voted to discharge James Gaylord.

V.

There is no allegation or evidence that James Gaylord has ever committed any overt acts of homosexuality. The sole basis for his discharge is James Gaylord's status as a homosexual.

VI.

Jack Beer, Wilson High School Vice-Principal, Maynard Ponko, Wilson High School Principal, and Trygve Blix, former Tacoma School District personnel director, all testified that in their opinion, the knowledge of James Gaylord's homosexuality would cause some students, teachers, and parents to object to James Gaylord's continued presence in the classroom, and that these types of objections would impair said administrators' ability to administer the school and would therefore damage the educational process.

VII.

Drs. S. Harvard Kauffman and Jerman Rose, psychiatrists specializing in child and adolescent psychiatry, testified that in their opinion James Gaylord's presence in the classroom did not pose any threat of harm to the personal or educational development of the students at Wilson High School, and that in their opinion James Gaylord would be able to function well as a teacher even if his students had knowledge of his homosexuality. Both doctors testified that some students and parents might object to James Gaylord's continued presence in the classroom. Both doctors also testified that homosexuality is acquired, not inherited, and that, while a student's sexual orientation was probably fixed by the time he got to high school, he still had a choice as to his behavior. Dr. Kauffman testified that homosexuality is a deviation and

a disease and that if a homosexual wanted to change his behavior a psychiatrist would attempt to help him do so. Mr. Gaylord testified that he has known he was homosexual for the last 20 years and has not sought treatment because he did not regard it as a problem.

VIII.

Dr. Stephen Sulzbacher, an educational psychologist from the University of Washington, testified that he had consulted with virtually every school district in Western Washington, was personally aware of the professional competence of homosexuals teaching in said public schools, and that, in his opinion, James Gaylord would be able to continue teaching effectively in the classroom, even if students, teachers and parents knew of his homosexuality. Dr. Sulzbacher also testified that none of the homosexuals of whom he was aware had taken a public stance as such, or informed their administrations of their sexual orientation. He also testified that parents can have a decided effect on school boards, on students, and on the educational process, and that some parents would be dissatisfied with the retention of an admitted homosexual and that their dissatisfaction would find its way to the classroom.

IX.

The testimony of James Gaylord, former students and fellow teachers is undisputed that James Gaylord has taught elective courses at Wilson High School and that no student would be required to take a course from James Gaylord if he or she did not want James Gaylord as a teacher. It was the testimony of the administration that, in their opinion, some students would take courses from Mr. Gaylord out of curiosity as to his sexual orientation, and that others would take courses because of it.

The court then made the following:

CONCLUSIONS OF LAW

I.

This court has jurisdiction over the subject matter of this appeal.

II.

R.C.W. 28A.58.101 charges the Board of Directors of Tacoma School District No. 10 with enforcing certain rules and regulations, and R.C.W. 28A.58.1011 provides that these rules "shall be interpreted to ensure that the optimum learning atmosphere of the classroom is main-

tained, and that the highest consideration is given to the judgment of qualified, certified [*sic*] educations [*sic*] regarding conditions necessary to maintain the optimum learning atmosphere."

III.

Pursuant to R.C.W. 28A.58.1011, this court is required to give the highest consideration to the judgment of the qualified, certified educators regarding conditions necessary to maintain the optimum learning atmosphere.

IV.

A teacher may be discharged where his conduct or status would impair the optimum learning atmosphere in a school district.

V.

James Gaylord's status as a homosexual became publicly know prior to the time, according to the undisputed testimony of Kim Balcolm, that Mr. Balcolm was told by a casual acquaintance he met on the street that Mr. Gaylord was a person at Wilson High School with whom matters of homosexuality could be discussed.

VI.

This public knowledge of James Gaylord's status as homosexual would impair the optimum atmosphere in the classroom and is cause for dismissal under R.C.W. 28A.58.450.

VII.

The discharge of James Gaylord on the basis of his status as homosexual, was proper, notwithstanding the fact that homosexuality was not a basis for discharge as set forth in School District Policy 4119 covering discharge. Tacoma School District Policy No. 4119 adopted pursuant to R.C.W. 28A.58.450, under which the appellant was discharged, is not unconstitutionally void for vagueness because of a failure to specify homosexuality as a basis for discharge.

VIII.

A rational nexus between Mr. Gaylord's status as a publicly known homosexual and his job was established by the testimony of the administrators of School District No. 10 that this fact would impair the educational process.

IX.

Discharging James Gaylord from his teaching position solely on the basis of his status as a publicly known homosexual is not unconstitutional and does not violate

the equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution, or Article 1, Section 12 of the Constitution of the State of Washington.

X.

Discharging James Gaylord from his teaching position solely on the basis of his status as a publicly known homosexual is not unconstitutional and does not violate his right to privacy guaranteed by the First through Tenth Amendments to the United States Constitution or Article 1, Section 7 of the Constitution of the State of Washington, because he forfeited his right to privacy by making his status known to Frank Rivers and Tom Hartwick and through them, to Kim Balcolm and directly to Jack Beer.

XI.

Discharging James Gaylord from his teaching position solely on the basis of his status as a publicly known homosexual does not violate his contract with the Tacoma School District No. 10, and does not violate any rights guaranteed to James Gaylord by the statutes of the State of Washington.

The assignments of error are directed solely to the entry of conclusions of law Nos. 2 through 11.

A teacher may be discharged only for "sufficient cause" and the burden of proof is upon the district to establish cause for discharge. The majority has concluded that the conclusions of law are not supported by the findings of fact. No useful purpose would be served by sending the case back to the trial court for additional findings or evaluation. There are no other relevant facts which can be found.

It is the obligation of this court to arrive at the appropriate conclusions of law which flow from the findings of fact.

The allegations of "immorality" as sufficient cause for discharge were not maintained at the trial and not seriously argued in this court. The substance of defendant's argument interpreted most strongly in the school board's favor is that:

1. Plaintiff was not discharged for "immorality" per se;

2. Plaintiff was discharged for a "status," and the improper conduct in making "known" his status.

The trial court's decision is grounded in the misapplication of RCW 28A.58.1011, which leads him to conclusion of law No. 6:

> This public knowledge of James Gaylord's status as homosexual would impair the optimum atmosphere in the classroom and is cause for dismissal under R.C.W. 28A.58.450.

As noted by the majority, the "decision to discharge must be based 'solely upon the cause or causes specified in the notice of probable cause . . . and established by a preponderance of evidence at the hearing . . .' RCW 28A. 58.450."

The trial court did not sustain the cause of discharge to be "immorality." "Sufficient cause" for discharge, as determined by the trial court is predicated solely on conclusion of law No. 4:

> A teacher may be discharged where his conduct or status would impair the optimum learning atmosphere in a school district.

Though the trial must be de novo, the statute mandates a reversal. The discharge was based upon a cause not specified in the letter of November 21, 1972, and defined by the stipulation of the parties as coming within policy 4119 "(5) immorality."

In view of the majority's disposition of this matter, we must inquire whether a new determination by the trial court that the plaintiff's discharge may be sustained upon the basis that his status "would 'impair the optimum learning atmosphere in the classroom,'" constitutes legally sufficient cause.

The only requirement that an "optimum learning atmosphere" shall be maintained is found in RCW 28A.58.1011. We have concluded that the trial court was in error in its application of the statute.

RCW 28A.58.1011 by its terms does not purport to establish cause for teacher discipline. It does not apply to proceedings to discharge a teacher. It cannot be read into RCW 28A.58.450.

The early case of *Browne v. Gear*, 21 Wash. 147, 151-52, 57 P. 359 (1899), defined sufficient cause as follows:

> Such cause, in the absence of a definition in the statute, would seem to be such misconduct relating to her duties as a common school teacher as would justify the revocation of her right to teach; that is, either such incompetency in her vocation in and about the school as made her unfit for the station, or violations of rules in teaching, etc., or such moral turpitude outside her profession as would recoil on her efficiency in her work and injure the school.

Wojt v. Chimacum School Dist. 49, 9 Wn. App. 857, 862, 516 P.2d 1099 (1973), points out that RCW 28A.67.065, requires every school board to establish evaluative criteria and procedures and:

> Where a teacher is discharged because of classroom deficiencies, the consequences are severe. Chances of other employment in the profession are diminished, if not eliminated. Much time, effort, and money has been expended by the teacher in obtaining the requisite credentials. It would be manifestly unfair to allow a discharge for a teaching or classroom deficiency which is reasonably correctable. In our view, the legislative purpose of RCW 28A.67.065 was to prevent such injustice from occurring.

Wojt reemphasizes the requirement that sufficient cause for discharge must be based on *conduct* of the teacher which has adverse effects upon the "teacher's fitness to teach."

Denton v. South Kitsap School Dist. 402, 10 Wn. App. 69, 516 P.2d 1080 (1973), which is unique, does not alter *Wojt*'s requirement that sufficient cause for discharge be based on conduct of the teacher affecting adversely his fitness to teach.[1]

Even if it were determined that the statute intended to

[1]The evidence does not go beyond a conclusion that in the opinion of some school administrators the optimum learning atmosphere would be impaired. The prediction of a future event, which might not take place cannot constitute "conduct adversely affecting the teacher's classroom performance" which would be the basis for discharge.

establish a cause for discharge, it would not meet the constitutional due process test of specificity.

The adjective "optimum" is defined as "best or most favorable." *Webster's New Twentieth Century Dictionary* (1964) and *Random House Dictionary of the English Language* (1966). The precatory language of RCW 28A.58.1011 is no more than a well-intentioned legislative statement of the laudatory but seldom attainable goal. The desire to maintain the best learning atmosphere possible is not a sufficiently definite standard to deprive a teacher of his right to continue teaching. As applied in this case, RCW 28A.58.1011 must fail as "void for vagueness" under the due process clause of the fourteenth amendment to the United States Constitution, and article 1, section 3 of the Washington State Constitution. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275 (1961); *Baggett v. Bullitt*, 377 U.S. 360, 12 L. Ed. 2d 377, 84 S. Ct. 1316, (1963); *Seattle v. Drew*, 70 Wn.2d 405, 423 P.2d 522, 25 A.L.R.3d 827 (1967).

There is no evidence nor findings of fact which can sustain the burden of proof necessary to establish sufficient cause for discharge. The matter should be remanded to the trial court with instructions to reinstate the appellant in his position and to determine the other issues raised by the complaint.

HUNTER, J. (dissenting)—The majority has remanded this case to the trial court for a reevaluation of the testimony upon the theory that giving the highest consideration to the judgment of qualified certificated educators regarding conditions necessary to maintain the optimum learning atmosphere, as required by RCW 28A.58.1011, does not apply unless it relates to a rule adopted by the board of directors regarding pupil conduct; that a teacher who admits being a homosexual does not violate a rule regarding pupil conduct. Hence the above statutory requirement as to the weight to be given to the judgment of qualified educators, as exercised in this case, does not apply. I disagree.

This is reading RCW 28A.58.1011 out of context and disregards the entire purpose of the statute. The plain language of the statute does not limit the *conditions necessary* to maintain the optimum learning of the classroom to pupil conduct. It is clear that the manifest purpose of the statutory mandate is to maintain an optimum learning atmosphere in the classroom—and to say this must be limited to the conduct of pupils and that it does not apply to that of a teacher, strains logic and credulity. Implicitly, it was the intention of the legislature to protect the optimum learning atmosphere in the classroom from subversion whether it be by a teacher's conduct, by his example or otherwise or by the conduct of the pupils.

In this case the principal, the assistant principal, and the former assistant superintendent of personnel were unanimous in their opinion that a teacher holding himself out as a homosexual would be damaging to the optimum learning atmosphere of the classroom.

Mr. John Beer, assistant principal at Woodrow Wilson High School, testified as follows:

> A. I feel that homosexuality is out of place in a public school classroom. I feel that a student from his initial years as a six-year-old until he graduates from a high school, at about 17 years, is going through his formative stages, and that a teacher, as well as a home or a church, but certainly a teacher is extremely instrumental in influencing a child in these developmental years. And I feel that consciously or unconsciously a teacher that is homosexual can do irrepairable damage in these formative years. . . . If a homosexual were on our faculty, a known homosexual on our faculty, No. 1, as an Assistant Principal I would have to defend his remaining there to other members of the staff. . . . It would be an extremely disruptive type of thing to have a homosexual serving as a staff member. . . . Well, I have already operated under the assumption that homosexuality is an abnormality and would be classified as immoral, and as such I don't believe that a homosexual meets the standards, the professional standards, the community standards, that we would expect of a classroom teacher.

High School Principal, Maynard Ponko, testified as follows:

> A. . . . I feel that I know had I not taken action within the semester, the quarter, that we would have had students come up and object and not to—because they did not want to be put in his class. I had one, in particular, and he was rather violent about it. And I also feel a responsibility to the whole community and our school and feel this is not the place for a homosexual, a known homosexual, to be working. Q. What, if any, effect would this have on the faculty? A. It would form isolations. Q. Would you further amplify "isolations." I don't understand the term. A. Well, it had already started. Ridicule, disgust, contempt, for our housing the situation, and why don't we move faster? Doesn't the School Board have a right to move?

Mr. Trygve Blix, recently retired Assistant Superintendent of Personnel, Tacoma Schools, testified as follows:

> A. . . . I think there is a way of life that I have looked for in employing teachers through the years, and fundamentally I don't think that homosexuality is a way of life that I can tolerate in my position. . . . I've worked with adolescents a long time and adolescents do admire adults, and adolescents also sometimes admire things that I don't think society accepts, as a whole. We have all seen a lot of that and I think that could be, if the word was out that there was a homosexual teaching, that youngsters even with those tendencies could well accept them and say, this person is a fine man, he's a homosexual, I can't see what's wrong with it . . . I think . . . that we've got to teach by examples as well as by discipline.

The foregoing testimony of qualified certificated educators clearly supports the trial court's conclusion that the school board acted properly in dismissing the appellant from the Tacoma school system. The trial court was fully justified in carrying out the purpose and intent of the statute, RCW 28A.58.1011, by giving the highest consideration to the testimony of these qualified certificated educators to insure that conditions necessary for the optimum learning atmosphere of the classroom are maintained.

To send this case back to the trial court can serve no

useful purpose and will only cause undue delay in the final disposition of the case.

The trial court should be affirmed.

HAMILTON, J., concurs with HUNTER, J.

Petition for rehearing denied August 12, 1975.

SECOND OPINION OF THE SUPREME COURT OF WASHINGTON

[No. 44078. En Banc. January 20, 1977.]

JAMES M. GAYLORD, *Appellant*, v. TACOMA SCHOOL DISTRICT NO. 10, ET AL, *Respondents*.

[1] Schools and School Districts—Teachers—Discharge—Sufficient Cause—"Immorality." "Immorality," as a sufficient cause for discharge of a teacher under the provisions of RCW 28A.58.100, involves conduct generally considered immoral *and* the actual or prospective adverse performance as a teacher resulting from such conduct.

[2] Administrative Law and Procedure—Administrative Regulations—Construction—Meaning of Words. A word not specifically defined in an administrative regulation will be given its usual and customary meaning.

[3] Evidence—Testimony—Construction—Ambiguity. Absent other indicia, a testimonial admission may be construed in a manner least favorable to the witness.

[4] Schools and School Districts—Teachers—Discharge—Sufficient Cause—Homosexuality. The term "homosexual," when used without further explanation, means a person who voluntarily is erotically attracted to members of the same sex, and when

such attraction is expressed in actual homosexual behavior, such behavior is immoral as that term is used in RCW 28A.70.160 which makes immorality a ground for revoking a teacher's certificate.

[5] Appeal and Error—Findings of Fact—Review—Conflicting Evidence. Findings of fact supported by substantial evidence will be upheld on review despite conflicting evidence.

[6] Schools and School Districts—Teachers—Discharge—Sufficient Cause—Homosexuality. Public knowledge by school authorities and students of a teacher's homosexuality adversely affects the teacher's performance for purposes of discharge for sufficient cause under RCW 28A.58.100 as implemented by a policy which provides for discharge for immorality.

UTTER and DOLLIVER, JJ., dissent by separate opinions; ROSELLINI and HICKS, JJ., did not participate in the disposition of this case.

Nature of Action: A schoolteacher's homosexual conduct was classified as immoral by the school board of directors and the teacher was discharged.

Superior Court: In a de novo review of the discharge, the Superior Court for Pierce County, No. 215450, James V. Ramsdell, J., held on December 30, 1975, that homosexual conduct was immoral, that public knowledge of it adversely affected the teacher's performance, and that such conduct and effect was sufficient cause for discharge.

Supreme Court: Initial consideration of the teacher's appeal resulted in a reversal of the Superior Court's action and a remand for further consideration under a corrected construction of a statute. Upon remand, new findings and conclusions were entered and a further appeal by the teacher followed. The Supreme Court *affirms* the judgment of the trial court on all grounds.

Peterson, Bracelin, Young & Putra, by *Christopher E. Young*, for appellant.

Don Herron, Prosecuting Attorney, and *Roger J. Miener, Deputy*, for respondents.

HOROWITZ, J.—Plaintiff-appellant, James Gaylord, appeals a judgment of the trial court upholding Gaylord's

discharge from employment as a high school teacher by defendant school district. A prior appeal resulted in a remand to the trial court to enter new findings based upon application of the proper statutory burden of proof of the district. *Gaylord v. Tacoma School Dist. 10*, 85 Wn.2d 348, 535 P.2d 804 (1975). The case now before us is an appeal from the judgment entered on new findings and conclusions entered by the trial court on remand.

Defendant school district discharged Gaylord—who held a teacher's certificate—from his teaching position at the Wilson High School in Tacoma on the ground of "immorality" because he was a known homosexual. Gaylord appealed this decision to the Superior Court for de novo trial under RCW 28A.88.015. The court after trial entered findings, conclusions, and judgment to the effect there was sufficient cause for discharge. Gaylord then appealed the Superior Court judgment to this court which in turn remanded the cause back to the Superior Court for further consideration. It had erroneously construed a statute to require it to give special weight to the testimony of school personnel. *Gaylord v. Tacoma School Dist. 10, supra*. On remand reconsideration, the Superior Court concluded in substance Gaylord was properly discharged for immorality because he was homosexual, and as a known homosexual, his ability and fitness to teach was impaired with resulting injury to the school. Gaylord again appeals to this court assigning error to various findings, conclusions, and judgment.

We need consider only the assignments of error which raise two basic issues: (1) whether substantial evidence supports the trial court's conclusion plaintiff-appellant Gaylord was guilty of immorality; (2) whether substantial evidence supports the findings, that as a known homosexual, Gaylord's fitness as a teacher was impaired to the injury of the Wilson High School, justifying his discharge by the defendant school district's board of directors. The relevant findings of the trial court may be summarized as follows.

Gaylord knew of his homosexuality for 20 years prior to his trial, actively sought homosexual company for the past several years, and participated in homosexual acts. He knew his status as a homosexual, if known, would jeopardize his employment, damage his reputation, and hurt his parents.

Gaylord's school superior first became aware of his sexual status on October 24, 1972, when a former Wilson High student told the school's vice-principal he thought Gaylord was a homosexual. The vice-principal confronted Gaylord at his home that same day with a written copy of the student's statement. Gaylord admitted he was a homosexual and attempted unsuccessfully to have the vice-principal drop the matter.

On November 21, 1972, Gaylord was notified the board of directors of the Tacoma School Board had found probable cause for his discharge due to his status as a publicly known homosexual. This status was contrary to school district policy No. 4119(5), which provides for discharge of school employees for "immorality." After hearing, the defendant board of directors discharged Gaylord effective December 21, 1972.

The court found an admission of homosexuality connotes illegal as well as immoral acts, because "sexual gratification with a member of one's own sex is implicit in the term 'homosexual.'" These acts were proscribed by RCW 9.79-.120 (lewdness) and RCW 9.79.100 (sodomy).

After Gaylord's homosexual status became publicly known, it would and did impair his teaching efficiency. A teacher's efficiency is determined by his relationship with his students, their parents, the school administration, and fellow teachers. If Gaylord had not been discharged after he became known as a homosexual, the result would be fear, confusion, suspicion, parental concern, and pressure on the administration by students, parents, and other teachers.

The court concluded "appellant was properly discharged by respondent upon a charge of immorality upon his

admission and disclosure that he was a homosexual" and that relief sought should be denied.

Was Gaylord guilty of immorality?

Our concern here is with the meaning of immorality in the sense intended by school board policy No. 4119(5). School boards have broad management powers. RCW 28A-.58. Under RCW 28A.58.100(1) the school board may discharge teachers for "sufficient cause." Policy No. 4119(5) adopted by the school board and in effect during the term of Gaylord's teaching contract with defendant school district permits the Tacoma School Board of Directors to treat "immorality" as sufficient cause for discharge.

"Immorality" as used in policy No. 4119(5) does not stand alone. RCW 28A.67.110 makes it the duty of all teachers to "endeavor to impress on the minds of their pupils the principles of morality, truth, justice, temperance, humanity and patriotism . . ." RCW 28A.70.140 requires an applicant for a teacher's certificate be "a person of good moral character." RCW 28A.70.160 makes "immorality" a ground for revoking a teacher's certificate. Other grounds include the commission of "crime against the law of the state." The moral conduct of a teacher is relevant to a consideration of that person's fitness or ability to function adequately as a teacher of the students he is expected to teach—in this case high school students. *See Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 225, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

[1] "Immorality" as a ground of teacher discharge would be unconstitutionally vague if not coupled with resulting actual or prospective adverse performance as a teacher. *Denton v. South Kitsap School Dist. 402*, 10 Wn. App. 69, 516 P.2d 1080 (1973); *Morrison v. State Bd. of Educ., supra* at 225 n.15. The basic statute permitting discharge for "sufficient cause" (RCW 28A.58.100(1)) has been construed to require the cause must adversely affect the teacher's performance before it can be invoked as a ground for discharge. *Gaylord v. Tacoma School Dist. 10, supra.*

It follows the term "immorality" is not to be construed in its abstract sense apart from its effect upon teaching efficiency or fitness to teach. In its abstract sense the term is not and perhaps cannot be comprehensively defined although it can be illustrated.

[2] When, as in the case here, the term "immorality" has not been defined in policy No. 4119(5), it would seem reasonable to give the term its ordinary, common, everyday meaning as we would when construing an undefined term in a statute. *New York Life Ins. Co. v. Jones*, 86 Wn.2d 44, 47, 541 P.2d 989 (1975); *State v. Jones*, 84 Wn.2d 823, 830, 529 P.2d 1040 (1974); *Glaspey & Sons, Inc. v. Conrad*, 83 Wn.2d 707, 711, 521 P.2d 1173 (1974).

Was homosexuality immoral within the meaning of policy No. 4119(5)? We must first examine what the much dicussed term "homosexuality" means. In J. Walinder, *Transsexualism* 3 (1967), the author approves the following statement:

> The crucial characteristic of the homosexual is the desire for a physical sex relation with a person of his own sex. The eonist is repelled by the physical aspect of a homosexual relationship. (2) Homosexuals do not want to change their sex and identity. This is the fundamental anomoly in eonism.

D. West, in *Homosexuality* 10–11 (1967), the author explains:

> Homosexuality simply means the experience of being erotically attracted to a member of the same sex, and men or women who habitually experience strong feelings of this kind are called homosexuals. Those who act upon such feelings by participating in mutual sexual fondling or other forms of sexual stimulation with a partner of the same sex are known as 'overt' or practicing homosexuals. Those whose erotic feelings for the opposite sex are absent altogether, or slight in comparison to their homosexual feelings, are called exclusive or obligatory homosexuals. This is the type doctors usually have in mind when they refer without further qualification to 'homosexuals', or when they speak of 'true' homosexuals or "inverts", or when they consider the condition more or

> less permanent and unchangeable. Indeed, it is this exclusive, obligatory type of homosexual who presents the chief problem for contemporary society, and who is the main concern of this book. The thought of intimate contacts with their own sex disgusts many normal persons, but many of these exclusive homosexuals, especially male homosexuals, are even more appalled by the prospect of relations with the opposite sex.

(Footnote omitted.)

In characterizing homosexuality as immoral, the *New Catholic Encyclopedia*, for example, defines the term homosexual as:

> [A]nyone who is erotically attracted to a notable degree toward persons of his or her own sex and who engages, or is psychologically disposed to engage, in sexual activity prompted by this attraction.
>
> . . .
>
> . . . Once friendship between persons of the same sex leads to physical expression, a homosexual act has occurred . . . The danger remains that the individual will yield to desire for the overt act.

7 *New Catholic Encyclopedia* 116 (1967).

Other observations and definitions of homosexuality are in substance similar to those above quoted. *See* H. English & A. English, *A Comprehensive Dictionary of Psychological and Psychoanalytical Terms* (1958); H. Eysenk & W. Wurzburg, *Encyclopedia of Psychology* 66-67 (1958); 1 R. Goldenson, *The Encyclopedia of Human Behavior* 553-59 (1970); *Blackison's New Gould Medical Dictionary* 471 (1st ed. 1949); *Dorland's Illustrated Medical Dictionary* 686 (24th ed. 1965); *Psychiatric Dictionary* 348-51 (4th ed. 1970); *Steadman's Medical Dictionary* 584 (22d ed. 1972). *See generally The Encyclopedia Americana* 629 (1963); 16 *Encyclopedia Britannica* 603 (1974); 14 *International Encyclopedia of the Social Sciences* 222 (1968).

[3, 4] There appears to be general agreement, so far as it goes, with Webster's definition of homosexual: "'one whose sexual inclination is toward those of the individual's own sex rather than the opposite sex.'" *State v. Rose*, 62 Wn.2d 309, 313, 382 P.2d 513 (1963). In *State v. Rose*, *supra* at 313 the court approved this definition, continuing

> As thus defined, its application in describing appellant might be a permissible deduction from the evidence when arguing to the jury.

The medical and psychological and psychiatric literature on the subject of homosexuality distinguishes between the overt homosexual and the passive or latent homosexual. An overt homosexual has homosexual inclinations consciously experienced and expressed in actual homosexual behavior as opposed to latent. A latent homosexual is one who has "an erotic inclination toward members of the same sex, not consciously experienced or expressed in overt action; opposite of overt." *Steadman's Medical Dictionary*, *supra* at 584. However, it has been pointed out that "[a]ctually, individual homosexuals do not necessarily maintain an active or passive attitude exclusively in a given relationship, inasmuch as they alternate in the male and female roles." 3 A. Deutsch & H. Fishman, *The Encyclopedia of Mental Health* 747 (1963).

Moreover, homosexual experience of an overt nature varies among homosexuals, from males who are more or less exclusively homosexual to males that are only occasionally so. *See* Kinsey, Pomeroy & Martin, *Sexual Behavior in the Human Male* 650-51 (1948). *See generally* C. Socarides, *The Overt Homosexual* (1968); 3 *American Handbook of Psychiatry* (2d ed. 1974).

In the instant case Gaylord "admitted his status as a homosexual" (finding of fact No. 5) and "from appellant's own testimony it is unquestioned that homosexual acts were participated in by him, although there was no evidence of any overt act having been committed." (Finding of fact No. 3.)

These findings concerning Gaylord's homosexuality are based both on his admission and on other evidence. In determining the significance of the admission we first note the related rule stated in 2 C. Moore, *A Treatise on Facts or the Weight and Value of Evidence* § 1178, at 1322

(1908): "If the meaning of a party's written statement is in doubt, that construction must be adopted which is least favorable to him; 'he selected its language.'" (Citing *Wood v. Chetwood*, 44 N.J. Eq. 64, 14 A. 21, 24 (1888).) This court has also adopted the rule that ambiguous language in written instruments "should be construed against the party using the language." *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 918, 468 P.2d 666 (1970); *Wilkins v. Grays Harbor Community Hosp.*, 71 Wn.2d 178, 427 P.2d 716 (1967).

This rule of construction concerning his admission of homosexuality is supported by evidence that Gaylord was and had been a homosexual for 20 years. He also testified that in the 2-year period before his discharge, he actively sought out the company of other male homosexuals and participated actively as a member of the Dorian Society (a society of homosexuals). He responded to a blind advertisement in the society's paper for homosexual company. He concealed his homosexuality from his parents until compelled to reveal it by the present dispute.

If Gaylord meant something other than homosexual in the usual sense, he failed to explain what he meant by his admission of homosexuality or being a homosexual so as to avoid any adverse inference, although he had adequate opportunity at trial to do so. He clearly had a right to explain that he was not an overt homosexual and did not engage in the conduct the court ascribed to him which the court found immoral and illegal. Evidence that explains the admission or qualifies it is clearly admissible. 1 Conrad, *Modern Trial Evidence* 377 (1966). *See National Ass'n of Creditors v. Grassley*, 159 Wash. 185, 292 P. 416 (1930); *Ryan v. Westgard*, 12 Wn. App. 500, 530 P.2d 687 (1975); *Berkovitch v. Luketa*, 49 Wn.2d 433, 302 P.2d 211 (1963). There was uncontroverted evidence plaintiff was a competent and intelligent teacher so the court could reasonably assume Gaylord knew what homosexuality could mean. It was not a word to be thoughtlessly or lightly used. Gaylord's precaution for 20 years to keep his status of being

a homosexual secret from his parents is eloquent evidence of his knowledge of the serious consequences attendant upon an undefined admission of homosexuality.

He testified that in June 1970 he realized that if he was "ever going to have [homosexual] friends . . . that I needed, that I was going to have to make more efforts of my own to find these people because I wasn't going to stumble across them by accident as I expected." It was about that time he joined the Dorian Society. He testified he "felt very comfortable with the people there." Eventually he began to attend a good many of their functions. On one occasion a high school boy conferred with the plaintiff about homosexuality and learned that plaintiff was "heavily involved" for a period of a month with a person whose advertisement he had answered. It would have been a simple matter for Gaylord to have explained the physical side, if any, of his relationship but he did not do so.

Our next inquiry is whether homosexuality as commonly understood is considered immoral. Homosexuality is widely condemned as immoral and was so condemned as immoral during biblical times. A Kinsey, W. Pomeroy & C. Martin, *Sexual Behavior in the Human Male* 483 (1948); S. Weinberg & C. Williams, *Male Homosexuals* 17-18, 252, 256 (1974); D. West, *supra* at 96-101; 8 *Encyclopedia Judaica* (1971) col. 961; 7 *New Catholic Encyclopedia* 116-19 (1967); 3 A. Deutsch & H. Fishman, *The Encyclopedia of Mental Health* 763 (1963).

A sociologist testified in the instant case: "A majority of people and adults in this country react negatively to homosexuality." A psychiatrist testified "I would say in our present culture and certainly, in the last few hundred years in Western Europe and in America this [homosexuality] has been a frightening idea . . ."

The court found "sexual gratification with a member of one's own sex is implicit in the term 'homosexual.'" (Finding of fact No. 8.) This finding would not necessarily apply to latent homosexuals, however, the court in effect found from the evidence and reasonable inferences therefrom, it

applied to Gaylord. These acts—sodomy and lewdness—were crimes during the period of Gaylord's employment and at the time of his discharge. RCW 9.79.100 and RCW 9.79.120.

Volitional choice is an essential element of morality. One who has a disease, for example, cannot be held morally responsible for his condition. Homosexuality is not a disease, however. Gaylord's witness, a psychiatrist, testified on cross-examination that homosexuality except in a case of hormonal or congenital defect (not shown to be present here) is not inborn. Most homosexuals have a "psychological or acquired orientation." Only recently the Board of the American Psychiatric Association has stated: "homosexuality . . . by itself does not necessarily constitute a psychiatric disorder." The board explained that the new diagnostic category of sexual orientation disturbance applies to:

> "individuals whose sexual interests are directed primarily towards people of the same sex and who are either disturbed by, in conflict with, or wish to change their sexual orientation." . . . [this is] "distinguished from homosexuality, which by itself does not necessarily constitute a psychiatric disorder."

A.P.A. Rules Homosexuality Not Necessarily a Disorder, 9 *Psychiatric News* (Jan. 1974), at 1.

Nevertheless it is a disorder for those who wish to change their homosexuality which is acquired after birth. In the instant case plaintiff desired no change and has sought no psychiatric help because he feels comfortable with his homosexuality. He has made a voluntary choice for which he must be held morally responsible. L. Hatterer, *Changing Homosexuality in the Male, Treatment for Men Troubled by Homosexuality* 58, 445 app. 1 (1970).

The remaining question on this point is whether the repeal of the sodomy statute (RCW 9.79.100), while this case was pending, deprives sodomy of its immoral character. In the first place the repeal did not go into effect until July 1, 1976, sometime after Gaylord's discharge. Sodomy between consenting adults is no longer a crime. RCW

9A.88; RCW 9A.98.010; RCW 9A.88.100. *See also* RCW 9A.88.010 and .020. Generally the fact that sodomy is not a crime no more relieves the conduct of its immoral status than would consent to the crime of incest.

The next question is whether the plaintiff's performance as a teacher was sufficiently impaired by his known homosexuality to be the basis for discharge. The court found that Gaylord, prior to his discharge on December 21, 1972, had been a teacher at the Wilson High School in the Tacoma School District No. 10 for over 12 years, and had received favorable evaluations of his teaching throughout this time. (Findings of fact Nos. 1 and 2.) The court further found that "while plaintiff's status as a homosexual [was] unknown to others in the school," his teaching efficiency was not affected nor did his status injure the school. When, however, it became publicly known that Gaylord was a homosexual "the knowledge thereof would and did impair his efficiency as a teacher with resulting injury to the school had he not been discharged." (Finding of fact No. 9.)

The court further found:

> A teacher's efficiency is determined by his relationship with students, their parents, fellow teachers and school administrators. In all of these areas the continued employment of appellant after he became known as a homosexual would result, had he not been discharged. in confusion, suspicion, fear, expressed parental concern and pressure upon the administration from students, parents and fellow teachers, all of which would impair appellant's efficiency as a teacher and injure the school.

(Finding of fact No. 10.)

Gaylord assigns error to findings of fact numbers 9 and 10, contending there is no substantial evidence to support either. We do not agree.

First, he argues his homosexuality became known at the school only after the school made it known and that he should not be responsible therefor so as to justify his discharge as a homosexual. The difficulty with this argument is twofold. First, by seeking out homosexual company he took the risk his homosexuality would be discovered. It was

he who granted an interview to the boy who talked to him about his homosexual problems. The boy had been referred to Gaylord for that purpose by the homosexual friend to whom Gaylord had responded favorably in answering his advertisement in the paper of the Dorian Society. As a result of that interview the boy came away with the impression plaintiff was a homosexual and later told the assistant high school principal about the matter. The latter in turn conferred with plaintiff for the purpose of verifying the charge that had been made. It was the vice-principal's duty to report the information to his superiors because it involved the performance capabilities of Gaylord. The school cannot be charged with making plaintiff's condition known so as to defeat the school board's duty to protect the school and the students against the impairment of the learning process in all aspects involved.

[5, 6] Second, there is evidence that at least one student expressly objected to Gaylord teaching at the high school because of his homosexuality. Three fellow teachers testified against Gaylord remaining on the teaching staff, testifying it was objectionable to them both as teachers and parents. The vice-principal and the principal, as well as the retired superintendent of instruction, testified his presence on the faculty would create problems. There is conflicting evidence on the issue of impairment but the court had the power to accept the testimony it did on which to base complained of findings. *See Jacobs v. Brock*, 73 Wn.2d 234, 437 P.2d 920 (1968); *Kuster v. Gould Nat'l Batteries, Inc.*, 71 Wn.2d 474, 429 P.2d 220 (1967). The testimony of the school teachers and administrative personnel constituted substantial evidence sufficient to support the findings as to the impairment of the teacher's efficiency.

It is important to remember that Gaylord's homosexual conduct must be considered in the context of his position of teaching high school students. Such students could treat the retention of the high school teacher by the school board as indicating adult approval of his homosexuality. It would be unreasonable to assume as a matter of law a teacher's

ability to perform as a teacher required to teach principles of morality (RCW 28A.67.110) is not impaired and creates no danger of encouraging expression of approval and of imitation. Likewise to say that school directors must wait for prior specific overt expression of homosexual conduct before they act to prevent harm from one who chooses to remain "erotically attracted to a notable degree towards persons of his own sex and is psychologically, if not actually disposed to engage in sexual activity prompted by this attraction" is to ask the school directors to take an unacceptable risk in discharging their fiduciary responsibility of managing the affairs of the school district.

We do not deal here with homosexuality which does not impair or cannot reasonably be said to impair his ability to perform the duties of an occupation in which the homosexual engages and which does not impair the effectiveness of the institution which employs him. However, even the federal civil service regulations on which Gaylord relies to show a change in attitude towards homosexuals provides:

> [W]hile a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment to the Federal service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness."

2 CCH Employment Practices Guide ¶ 5339 (1975). It must be shown that the conduct of the individual may reasonably be expected to interfere with the ability of the person's fitness in the job or against the ability to discharge its responsibility. 2 CCH Employment Practices Guide, *supra*. These principles are similar to those applicable here. The challenged findings and conclusions are supported by substantial evidence.

Affirmed.

WRIGHT, C.J., HAMILTON, STAFFORD, and BRACHTENBACH, JJ., and KALE, J. Pro Tem., concur.

DOLLIVER, J. (dissenting)—The appellant, Mr. Gaylord, had been a teacher at Wilson High School for over 12 years at the time of his discharge. In college, he had been an outstanding scholar; he graduated Phi Beta Kappa from the University of Washington and was selected "Outstanding Senior" in the political science department. He later received a masters degree in librarianship. As a teacher, the evaluations made of Mr. Gaylord were consistently favorable. The most recent evaluation of this teaching performance stated that "Mr. Gaylord continues his high standards and thorough teaching performance. He is both a teacher and student in his field."

Despite this outstanding record, the trial court found that Mr. Gaylord should be discharged for "immorality." To uphold this dismissal, we must find substantial evidence supporting the finding that Mr. Gaylord was discharged for "sufficient cause," as required by RCW 28A.58.100. "Sufficient cause" has been defined as *"conduct which would affect the teacher's efficiency."* *Gaylord v. Tacoma School Dist. 10*, 85 Wn.2d 348, 349, 535 P.2d 804 (1975). This must be proven by the school district by a preponderance of the evidence. RCW 28A.58.450. For all the scholarly research done by the majority here, the most basic point has been missed; the respondent school board did not meet its burden of proof.

The majority upheld the trial court's finding that an admission of a homosexual status connotes illegal as well as immoral acts which are proscribed by RCW 9.79.100 (sodomy) and RCW 9.79.120 (lewdness). RCW 9.79.100 provides:

> Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished as follows: . . .

RCW 9.79.120 provides:

> Every person who shall lewdly and viciously cohabit with another not the husband or wife of such person, and every person who shall be guilty of open or gross lewdness, or make any open and indecent or obscene exposure of his person, or of the person of another, shall be guilty of a gross misdemeanor.

There is not a shred of evidence in the record that Mr. Gaylord participated in any of the acts stated above. While we have held in the past that "sufficient cause" requires certain *conduct (Browne v. Gear*, 21 Wash. 147, 57 P. 359 (1899); *Denton v. South Kitsap School Dist. 402*, 10 Wn. App. 69, 516 P.2d 1080 (1973)), we are presented here with a record showing no illegal or immoral conduct; we have only an admission of a homosexual status and Gaylord's testimony that he sought male companionship. *See McConnell v. Anderson*, 316 F. Supp. 809, 814 (D. Minn. 1970); *compare Moser v. State Bd. of Educ.*, 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972), *with Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

Undoubtedly there are individuals with a homosexual identity as there are individuals with a heterosexual identity, who are not sexually active. Mr. Gaylord, for all we know, may be one of these individuals. Certainly in this country we should be beyond drawing severe and far-reaching inferences from the admission of a status—a status which may be no more than a state of mind. Furthermore, there are homosexual activities involving a physical relationship which are not prohibited by statute. *See Morrison v. State Bd. of Educ., supra; McConnell v. Anderson, supra.*

The trial court made a most puzzling finding that, "From appellant's own testimony it is unquestioned that homosexual acts were participated in by him, although there was no evidence of any overt acts having been committed." The trial court essentially found that, as an admitted homosexual, unless Mr. Gaylord denied doing a particular immoral

or illegal act, he can be assumed to have done the act. The court has placed upon the appellant the burden to negate what it asserts are the implications that may be drawn from his testimony although he never was accused of participating in acts of sodomy or lewdness.

We must require here, as we have in the past, proof of conduct to justify a dismissal. The only conceivable testimony on conduct was the comment of the student that Gaylord and another male were "deeply involved" for about a month. This hardly qualifies as testimony either as to "immorality," sodomy, or lewdness. Finding no conduct, I am unwilling to take the leap in logic accepted by the majority that admission of a status or identity implies the commission of certain illegal or immoral acts.

In *McConnell v. Anderson, supra* at 814, the court said:

> An homosexual is after all a human being, and a citizen of the United States despite the fact that he finds his sex gratification in what most consider to be an unconventional manner. He is as much entitled to the protection and benefits of the laws and due process fair treatment as are others, at least as to public employment in the absence of proof and not mere surmise that he has committed or will commit criminal acts or that his employment efficiency is impaired by his homosexuality. Further, the decided cases draw a distinction between homosexuality, i.e., sexual propensity for persons of one's own sex and the commission of homosexual criminal acts. Homosexuality is said to be a broad term involving all types of deviant sexual conduct with one of the same sex, but not necessarily criminal acts of sodomy.

Surely the majority has adopted a novel approach. Mr. Gaylord was never at any time accused of performing any "homosexual acts." Yet because of his declared status, he must assume the burden of proving he did not commit certain illegal or immoral acts which have at no time been referred to or mentioned, much less described, by the school board. Presumably under this reasoning, an unmarried male who declares himself to be heterosexual will be held to have engaged in "illegal or immoral acts." The

opportunities for industrious school districts seem unlimited.

The majority goes to great lengths to differentiate between an overt and a latent homosexual. Authority is cited that overt homosexuality is "consciously experienced and expressed in actual homosexual behavior." Yet there is no evidence in the record of any actual behavior or acts, and the findings of the trial court specifically state "there was no evidence of any overt acts having been committed." The real problem faced by the majority is that the term "homosexual" is not mentioned once in the Revised Code of Washington. There is no law in this state against being a homosexual. All that is banned (prior to July 1, 1976) are certain acts, none of which Mr. Gaylord was alleged to have committed and none of which can it be either assumed or inferred he committed simply because of his status as a homosexual.

The second glaring error in this proceeding is the respondent's failure to establish that Mr. Gaylord's performance as a teacher was impaired by his homosexuality. As pointed out by the trial court in its findings, the evidence is quite clear that, having been a homosexual for the entire time he taught at Wilson High School, the fact of Mr. Gaylord's homosexuality did not impair his performance as a teacher. In other words, homosexuality per se does not preclude competence. *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973).

The evidence before the court is uncontroverted—Mr. Gaylord carefully kept his private life quite separate from the school. *Compare Acanfora v. Board of Educ., supra.* He made no sexual advances toward his professional contemporaries or his students. There is absolutely no evidence that Mr. Gaylord failed in any way to perform the duties listed in RCW 28A.67.110. In over 12 years of teaching at the same school, his best friends on the teaching staff were unaware of his homosexuality until the time of his discharge. Gaylord did not use his classroom as a forum for discussing homosexuality. Given the discretion with which

Gaylord conducted his private life, it appears that public knowledge of Gaylord's homosexuality occurred, as the trial court found, at the time of his dismissal. *Compare Pettit v. State Bd. of Educ.*, 10 Cal. 3d 29, 35, 513 P.2d 889, 109 Cal Rptr. 665 (1973). *Cf. McConnell v. Anderson, supra.*

At the trial, a variety of witnesses speculated on the effect that Gaylord's homosexuality might have on his effectiveness in the classroom. The speculation varied considerably. Certainly there were witnesses who testified that Gaylord's effectiveness would be damaged. There were also those who testified to the contrary. As a result, the trial court found that "the continued employment of appellant after he became known as a homosexual would result, had he not been discharged, in confusion, suspicion, fear, expressed parental concern and pressure upon the administration." The question this court must ask is whether a finding of detrimental effect can be made on the basis of conjecture alone.

The language of the court in *Fisher v. Snyder*, 346 F. Supp. 396, 401 (D. Neb. 1972), is helpful on this point. In that case, the teacher, Fisher, a single woman, had men "'not related'" stay in her apartment "'on several occasions ranging from one night to a period of at least one week.'" In holding that Mrs. Fisher's contract could not be terminated, the court said:

> Similarly, to justify a dampening of the rights of assembly or association and privacy the state in the present case must show that the termination of the teacher's contract was caused by conduct which "materially and substantially" interfered with the school's work or rights of students, and "undifferentiated fear or apprehension" of such interference is not enough. In the present case the state has failed to show any actual interference by Mrs. Fisher's conduct with any interest of the state in its educational endeavors. Not as much as a single student or teacher or administrator—or even townsperson—came forward with evidence that Mrs. Fisher's associations had affected any relationship she had with any student, any teacher, or any administrator. Her effectiveness as a teacher, disciplinarian, or counsellor stands without factual challenge. It is the lack of any factual, as contrasted with imagined or theoretical, connection between Mrs. Fisher's association and a substantial weakening of the educational enterprise conducted by the board of education that must result in a finding that the termination of the contract was not constitutionally justified.

See also Acanfora v. Board of Educ., supra.

Historically, the private lives of teachers have been controlled by the school districts in many ways. There was a time when a teacher could be fired for a marriage, a divorce, or for the use of liquor or tobacco. *See* H. Beale, *A History of Freedom of Teaching in American Schools* (1966 ed.); F. Delon, *Substantive Legal Aspects of Teacher Discipline* (1972). Although the practice of firing teachers for these reasons has ceased, there are undoubtedly those who could speculate that any of these practices would have a detrimental effect on a teacher's classroom efficiency as well as cause adverse community reaction. I find such speculation to be an unacceptable method for justifying the dismissal of a teacher who has a flawless record of excellence in his classroom performance. *See generally* 82 Harv. L. Rev. 1738, 1742 (1969).

What if Mr. Gaylord's status was as a black, a Roman Catholic, or a young heterosexual single person, instead of a male homosexual? Would his dismissal be handled in such manner? Mere speculation coupled with status alone is not enough. Finding No. 10 of the trial court reads as follows:

> A teacher's efficiency is determined by his relationship with students, their parents, fellow teachers and school administrators. In all of these areas the continued employment of appellant after he became known as a homosexual would result, had he not been discharged, in confusion, suspicion, fear, expressed parental concern and pressure upon the administration from students, parents and fellow teachers, all of which would impair appellant's efficiency as a teacher and injure the school.

In this finding, substitute the words "black" or "female" for "homosexual" and the defect of the majority approach is brought into sharp focus.

The basic unfairness of this situation was well expressed by Mr. Gaylord when he testified:

> I quite frankly find it rather galling to have sat through the school board hearing and once again through this trial and hear administrators say that I'm a good teacher, I've been a very good teacher, and yet to be without a job, particularly when I see other people who still hold their jobs who haven't read a book or turned out a new lesson plan or come up with anything creative in years.

"'The right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection.'" *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 239, 461 P.2d 375, 82 Cal. Rptr. 175 (1969), quoting *Yakov v. Board of Medical Examiners*, 68 Cal. 2d 67, 75, 435 P.2d 553, 64 Cal. Rptr. 785 (1968). To base a dismissal on the proof of a status with no showing of conduct and no showing of an actual detrimental effect on teaching efficiency violates the constitutional due process rights to which Mr. Gaylord is entitled. *See Mindel v. United States Civil Serv. Comm'n*, 312 F. Supp. 485 (N.D. Cal. 1970).

I dissent.

UTTER, J. (concurring in the dissent)—I concur in the result reached by the dissent. At the conclusion of the only trial where testimony was taken, the court found, "'There is no allegation or evidence that James Gaylord has ever committed any overt acts of homosexuality.'" *Gaylord v. Tacoma School Dist. 10*, 85 Wn.2d 348, 349, 535 P.2d 804 (1975). After remand, with no additional testimony having been taken, the trial court entered a second finding on the same issue, stating, "it is unquestioned that homosexual acts were participated in by him, although there was no evidence of any overt acts having been committed." This finding is not supported by substantial evidence in the record.

No one asked Gaylord whether he was involved in any overt act or acts. As the dissent points out, mere proof of the "status" of homosexuality is an insufficient basis for discharge of a teacher on the grounds of immorality. The burden of proof to establish something more was on the district, not Gaylord. The majority has concluded that Gaylord's admission of deep involvement with another male is sufficient to raise an inference of participation of immoral activity. His discharge should not be based upon this slimmest of inferences.

DOLLIVER, J., concurs with UTTER, J.

FIRST ORAL DECISION
OF SUPERIOR COURT

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND
FOR THE COUNTY OF PIERCE

IN RE: JAMES M. GAYLORD,	)	
	)	No. 215450
Appellant,	)	
	)	ORAL DECISION:
v.	)	September 28,
	)	1973
TACOMA SCHOOL DISTRICT	)	
NO. 10, et al.,	)	
	)	
Respondent.	)	

BEFORE the HONORABLE JAMES V. RAMSDELL,
Department No. 10.

APPEARANCES: CHRISTOPHER YOUNG &
WILLIAM R. CREECH
for Appellant.

RICHARD MONAGHAN
for Respondent.

THE COURT: First of all, let me state this, that I want to compliment all counsel in this case; it's been, recognizing that it is not necessarily so to the clients, but it's been a pleasure

to have a case of this nature where the attorneys have been of great assistance to the Court in furnishing briefs and in conducting the trial with cooperation between attorneys without any bickering or argument, which sometimes does accompany a trial.

The Court wants to make a few preliminary comments. I think this case emphasizes the fact that no two people are exactly alike; no two students, no two teachers, no two administrators, no two board members, no two attorneys; and, going up the ladder, take any volume of the United States Supreme Court and you will come to the conclusion that there are no two judges alike, however, oftentimes they get together on opinions and, speaking of the judges, oftentimes they divide five to four, as witnessed in our own state on the question of whether minds of reasonable men differ in a particular situation, our Supreme Court split five to four on that one question.

I have, last night, gone over all of the testimony and I don't think it is necessary that I detail the testimony generally. I do feel that we could start out by stating that the actual differences on important matters are few, and there are some admitted facts that the findings should positively carry with it, and that is that, number one, up until the date of Mr. Gaylord's discharge from Wilson High School on December 21, 1972, he had taught for twelve full years and was on his 13th year there; two, that he was considered by his superiors and those

teachers and former students who testified that he was an excellent teacher; third, that he was by his own testimony, a homosexual, extending back for a period of twenty years, although there was no testimony disclosing any overt act as a teacher which would disclose this fact, and the Court finds that no overt act existed.

It has not been an easy case for this Court to decide. While, at the time the Court had before it the September 4th argument on the constitutional questions, the Court did not have before it or there was not cited to the Court what is Appellant's Exhibit No. B, the letter of November 21, 1972, notifying Mr. Gaylord that the Board of Directors of Tacoma School District No. 10 has found probable cause "for your discharge from your duties as a teacher," advising him as to procedures, sending him a copy of the statute, pointing out the ten-day time limit, and concluding with the statement, "the specific probable cause for your discharge is that you admitted occupying a public status that is incompatible with the conduct required of teachers in this district; specifically, that you have admitted being a publicly known homosexual." Nowhere in that letter which is the basis of the discharge proceedings has the term "immorality" been used, and had the Court had this document called to his attention it would have been much more simple for the Court to have ruled, and would have ruled the same way. The findings do refer specifically to the contents of the last paragraph there as being, the statute as being in effect against the best interests

of the school district, and bases it on public knowledge. It is highly conceivable that had not Kim Balcom entered the picture Mr. Gaylord would have been there yet.

I note in Appellant's Exhibit No. C, Revised Policies and By-Laws, Policy No. 4119, that the Court can conceive of several reasonable grounds for discharge, and one of them is there is no specific ground there for being convicted of a crime. Now, since I have mentioned the word "crime" let me also point out that Mr. Gaylord is not charged with committing a crime, there is no statute making homosexuality itself a crime; there are several statutes, lewdness, sodomy, which can be, under circumstances of homosexuality,but there is no showing either in his private life or in his school life of any particular act constituting a crime, it's strictly on his own admission, and as was pointed out yesterday on a motion to dismiss that Mr. Gaylord, when confronted with Kim Balcom's letter or statement of October 24th '72 stated, and I quote, "What can I say?" That was Mr. Beer's testimony. Mr. Gaylord himself has said that that statement is--I forget the exact words--but in substance is essentially correct, but there were some things said that were totally wrong and some things said that were partly wrong, and he didn't pursue that to any great length, but the one thing that he did mention was that he never did tell Kim Balcom that he was a homosexual, and on Respondent's Exhibit No. 1 Mr. Kim Balcom didn't say that he was told directly, he said by talking with Mr. Gaylord he indicated that he was a

homosexual.

Counsel has mentioned Statute 28A.58.101, the first sentence being,

> "Every board of directors unless otherwise specifically provided by law shall, (1) enforce the rules and regulations prescribed by the Superintendent of Public Instruction and the State Board of Education for the government of schools, pupils and certified employees."

and in the next section, which came in 1972, as mentioned,

> "The rules adopted pursuant to RCW 28A.58.101 shall be interpreted to insure that the optimum learning atmosphere of the classroom is maintained, and that the highest consideration is given to the judgment of qualified certificated educators regarding conditions necessary to maintain the optimum learning atmosphere."

One of the reasons why I stated the differences between people is that that was exhibited in the testimony of the teachers who were called before the Court as witnesses. It wasn't a unanimous situation that they felt that he could adjust. The Court itself inquired from Dr. Salzbacher, Assistant Professor of Psychiatrics and Education at the University of Washington

about what influence the parents have on a school board, and disruption of classes, and doesn't that filter down to the class itself and he pointed to what I think is one of the classical examples, and that is in connection with bussing in Seattle. While it's not a parallel factual situation the Court knows, from having read the newspapers faithfully and having been a member of the parent-teacher's association on several occasions when my youngsters were young, that the parents can be a very vocal group, oftentimes carried away with more emotion than practical reason, and that has its influence right down the line. Or they might start at the teacher level and come up, or they might go back down. I can see why that 101 was passed by the Legislature; they are anxious for the "optimum learning atmosphere" and I do read into it that the school administrators, who I consider as experts, Mr. Beer, Mr. Ponko, Mr. Blix, I consider them as experts because they live with this day by day and they know the potential, and they are able to give an educated guess. I do not consider the school board members themselves who testified as particular experts because they don't live with it day by day, they attend meetings, certain things come before them, certain things do not, they are handled administratively. I might say, and I've mentioned this before, that I'm following very definitely in my decision the case of Reagan v. Board of Directors, 4 Wn. App. 279 in which, of course, it points out the necessity of having this trial de novo and that the decision of the Superior Court be based on the evidence presented

before it rather than the determination by the school board itself. It says, on Page 287,

> "While as a matter of practice due consideration should be given to the opinion of the school board as to the weight and credibility of the evidence, yet the Superior Court is required to form its own independent conclusions upon the evidence..."

and my decision is my own independent conclusion and, frankly, outside of the statement of Mr. Gillihan, "We followed the recommendation of the staff" I don't know that there was any opinion of the school board itself except that they were against homosexuals generally. Mr. Blix had mentioned that there had been four or five occasions when homosexuals resigned, but they had committed overt acts.

Now, as I say, this has not been an easy case but this matter has come out, and I mean it came out before it hit the newspapers; it came out when Kim Balcom confronted, in November of '71, confronted or rather asked to talk to Mr. Gaylord. Mr. Rivers knew it. Mr. Gaylord was asked, I think yesterday, "Are you acquainted with the name of Tom Hartwick?" Well, he had been mentioned by the group as one of the gay persons, so apparently he is in the know. Frank Rivers and Kim Balcom, Mr. Beer, and of course I believe it was Mr. Gaylord who testified and

said, "I did ask Jack 'must it go any further'?" And Mr. Beer said, "It's got to go up the ladder," which it had to. It went up the ladder and here we are.

In the Court's opinion under the evidence, and taking the evidence of the people who have to live with this, who seek under the statute to create the optimum learning atmosphere, the Court is going to rule for the Respondent. I feel I have no choice. I can say this, that I expect and I hope that this matter is taken further and that we have a clarification under our own state law on this one question. I don't think it's open and shut, and I think this would be a good vehicle for having that question tested.

If there is nothing further, the Court is at recess.

FIRST FINDINGS OF FACT AND
CONCLUSIONS OF LAW
BY SUPERIOR COURT

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND
FOR THE COUNTY OF PIERCE

In the Matter of JAMES M. GAYLORD, Appellant,	)	No. 215450
v.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
TACOMA SCHOOL DISTRICT NO. 10, et al., Respondent.	)	

THIS MATTER having come on for trial on the 26th, 27th, and 28th, and 28th days (sic) of September, 1973, before the Honorable James V. Ramsdell, Judge of the above entitled court, the appellant James M. Gaylord appearing in person and being represented by his attorneys, Christopher E. Young and William R. Creech, and the respondent being represented by its attorney, Richard A. Monaghan, deputy prosecuting attorney for Pierce County, and the court having heard the testimony of the witnesses called herein and having examined the exhibits offered and admitted into evidence, and having examined the

files and pleadings herein, and being fully advised in the premises, does now make and enter the following:

FINDINGS OF FACT

I.

James Gaylord was a teacher at Wilson High School in Tacoma School District No. 10 for twelve full years, and for part of a thirteenth year up to December 21, 1972.

II.

During his entire teaching career at Wilson High School James Gaylord received excellent evaluations.

III.

On October 24, 1972 a statement was prepared by one Kim Balcolm, a former student at Wilson High School, and was given to Wilson High School officials. This statement indicated that Kim Balcolm believed James Gaylord to be homosexual. On the same date this letter was shown to James Gaylord by Wilson High School Vice-Principal, Jack Beer, and James Gaylord stated to Jack Beer that he was homosexual, and that "he had come out of the closet". On November 21, 1972, James Gaylord was notified by letter that the Board of Directors of Tacoma School District No. 10 had found probable cause for his discharge from his duties as a teacher on the basis that he occupied a public status that was incompatible with the conduct required of teachers in Tacoma, specifically the status of being a publicly known homosexual.

IV.

On December 21, 1972, a hearing was held before three members of the Tacoma School District No. 10 Board of Directors, and said Board voted to discharge James Gaylord.

V.

There is no allegation or evidence that James Gaylord has ever committed any overt acts of homosexuality. The sole basis for his discharge is James Gaylord's status as a homosexual.

VI.

Jack Beer, Wilson High School Vice-Principal, Maynard Ponko, Wilson High School Principal, and Trygve Blix, former Tacoma School District personnel director, all testified that in their opinion, the knowledge of James Gaylord's homosexuality would cause some students, teachers, and parents to object to James Gaylord's continued presence in the classroom, and that these types of objections would impair said administrators' ability to administer the school and would therefore damage the educational process.

VII.

Drs. S. Harvard Kauffman and Jerman Rose, psychiatrists specializing in child and adolescent psychiatry, testified that in their opinion James Gaylord's presence in the classroom did not pose any threat of harm to the personal or educational development of the students at Wilson

High School, and that in their opinion James Gaylord would be able to function well as a teacher even if his students had knowledge of his homosexuality. Both doctors testified that some students and parents might object to James Gaylord's continued presence in the classroom. Both doctors also testified that homosexuality is acquired, not inherited, and that, while a student's sexual orientation was probably fixed by the time he got to high school, he still had a choice as to his behavior. Dr. Kauffman testified that homosexuality is a deviation and a disease and that if a homosexual wanted to change his behavior, a psychiatrist would attempt to help him do so. Mr. Gaylord testified that he has known he was homosexual for the last 20 years and has not sought treatment because he did not regard it as a problem.

VIII.

Dr. Stephen Sulzbacher, an educational psychologist from the University of Washington, testified that he had consulted with virtually every school district in Western Washington, was personally aware of the professional competence of homosexuals teaching in said public schools, and that, in his opinion, James Gaylord would be able to continue teaching effectively in the classroom, even if students, teachers, and parents knew of his homosexuality. Dr. Sulzbacher also testified that none of the homosexuals of whom he was aware had taken a public stance as such, or informed their administrations of their sexual orientation.

He also testified that parents can have a decided effect on school boards, on students, and on the educational process, and that some parents would be disatisfied with the retention of an admitted homosexual and that their disatisfaction would find its way to the classroom.

IX.

The testimony of James Gaylord, former students, and fellow teachers is undisputed that James Gaylord has taught elective courses at Wilson High School and that no student would be required to take a course from James Gaylord if he or she did not want James Gaylord as a teacher. It was the testimony of the Administration that, in their opinion, some students would take courses from Mr. Gaylord out of curiosity as to his sexual orientation, and that others would take courses because of it.

The court having made the above Findings of Fact, now makes and enters the following:

CONCLUSIONS OF LAW

I.

This court has jurisdiction over the subject matter of this appeal.

II.

R.C.W. 28A.51.101 charges the Board of Directors of Tacoma School District

No. 10 with enforcing certain rules and regulations, and R.C.W. 28A.51.101 provides that these rules "shall be interpreted to ensure that the optimum learning atmosphere of the classroom is maintained, and that the highest consideration is given to the judgment of qualified, certified educations regarding conditions necessary to maintain the optimum learning atmosphere."

III.

Pursuant to R.C.W.28A.58.101, this court is required to give the highest consideration to the judgment of the qualified, certified educators regarding conditions necessary to maintain the optimum learning atmosphere.

IV.

A teacher may be discharged where his conduct or status would impair the optimum learning atmosphere in a school district.

V.

James Gaylord's status as a homosexual became publicly known prior to the time, according to the undisputed testimony of Kim Balcolm, that Mr. Balcolm was told by a casual acquaintance he met on the street that Mr. Gaylord was a person at Wilson High School with whom matters of homosexuality could be discussed.

VI.

This public knowledge of James Gaylord's status as homosexual would impair the optimum learning atmosphere in the classroom and is cause for dismissal under R.C.W. 28A.58.450.

VII.

The discharge of James Gaylord on the basis of his status as homosexual, was proper, notwithstanding the fact that homosexuality was not a basis for discharge as set forth in School District Policy 4119 covering discharge. Tacoma School District Policy No. 4119 adopted pursuant to R.C.W. 28A.58.450, under which the appellant was discharged, is not unconstitutionally void for vagueness because of a failure to specify homosexuality as a basis for discharge.

VIII.

A rational nexus between Mr. Gaylord's status as a publicly known homosexual and his job was established by the testimony of the administrators of School District No. 10 that this fact would impair the educational process.

IX.

Discharging James Gaylord from his teaching position solely on the basis of his status as a publicly known homosexual is not unconstitutional and does not violate the equal protection clauses of the Fifth and Fourteenth Amendments

of the United States Constitution, or Article 1, §12 of the Constitution of the State of Washington.

X.

Discharging James Gaylord from his teaching position solely on the basis of his status as a publicly known homosexual is not unconstitutional and does not violate his right to privacy guaranteed by the First through Tenth Amendments to the United States Constitution and by Article 1, §7 of the Constitution of the State of Washington, because he forfeited his right to privacy by making his status known to Frank Rivers and Tom Hartwick and through them, to Kim Balcolm, and directly to Jack Beer.

XI.

Discharging James Gaylord from his teaching position solely on the basis of his status as a publicly known homosexual does not violate his contract with the Tacoma School District No. 10, and does not violate any rights guaranteed to James Gaylord by the statutes of the State of Washington.

Dated this 4th day of January 1974.

James V. Ramsdell
JUDGE

Presented by:

RICHARD A. MONAGHAN
Attorney for Tacoma School District No. 10

Approved as to form,
Notice of Presentation waived:

CHRISTOPHER E. YOUNG

WILLIAM R. CREECH
Attorneys for James M. Gaylord

JUDGMENT OF THE
SUPERIOR COURT

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
FOR PIERCE COUNTY

In the Matter of JAMES M. GAYLORD,	)	
	)	
Appellant,	)	No. 215450
	)	
v.	)	
	)	
TACOMA SCHOOL DISTRICT NO. 10, et al.,	)	JUDGMENT
	)	
	)	
Respondent.	)	

THIS MATTER having come on for trial on the 26th, 27th, and 28th days of September, 1973, before the Honorable James V. Ramsdell, Judge of the above entitled court, the appellant James M. Gaylord appearing in person and being represented by his attorneys, Christopher E.Young and William R. Creech, and the respondent being represented by its attorney, Richard Monaghan, deputy prosecuting attorney for Pierce County, and the court having heard the testimony of the witnesses called herein and having examined the exhibits offered and admitted into evidence, and having

examined the files and pleadings herein, and having on this date entered its Findings of Fact and Conclusions of Law, does now enter its judgment in this matter.

On the basis of the Findings of Facts and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED that the discharge of James Gaylord from his position with Tacoma School District No. 10 was for legal cause and was proper under the laws of the State of Washington and the Constitution of the United States and the Constitution of the State of Washington.

Dated 4 January 1974.

s/ James V. Ramsdell
Judge

Presented by:

Christopher E. Young

William R. Creech
Attorneys for James M. Gaylord

Approved as to form,
Notice of Presentation waived:

Richard Monaghan
Attorney for Tacoma School
District No. 10

SECOND ORAL DECISION OF
THE SUPERIOR COURT,
FOLLOWING REMAND

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND
FOR THE COUNTY OF PIERCE

IN RE: JAMES M. GAYLORD, Appellant, v. TACOMA SCHOOL DISTRICT NO. 10, et al., Respondent.	)	No. 215450

STATEMENTS OF FACTS

BE IT REMEMBERED that on the 3rd day of December, 1975, at the hour of 9:00 o'clock a.m., the above-entitled and numbered cause came regularly on for hearing before the Honorable JAMES V. RAMSDELL, one of the judges of the above-entitled court, sitting in Department No. 10 thereof, at the County-City Building, in the City of Tacoma, County of Pierce, State of Washington;

The appellant appeared in person and

through his attorney, CHRIS YOUNG, of the law firm of PETERSON, BRACELIN, YOUNG & PUTRA;

The respondent appeared through its attorney, Roger Miener , Deputy Prosecuting Attorney for Pierce County.

WHEREUPON, both sides having announced they were ready for hearing, the following proceedings were had, to-wit:

THE COURT: This is the case of in re James M. Gaylord, appellant, versus Tacoma School District No. 10, respondent, No. 215450, having been heard by the Supreme Court of the State of Washington, Cause No. 43482.

The purpose of this is to have the court announce its decision and proposed Findings of Fact and Conclusions of Law that he will sign. Let the record show that upon the remand of this case to this court, that the court re-read the entire transcript of the testimony, having in mind the admonition of the Supreme Court that I am not to overemphasize the testimony of the school administrators and school staff. It was obvious, at least to seven members of the court, that I had misinterpreted a statute and my decision had been made on a misinterpretation. I have been fully aware of that, and I am aware of the remand of the case back to me to review the record and to prepare Findings of Fact and Conclusions of Law with that in mind. I am prepared to do so.

The record should also show that upon having read the record, the court got in touch with counsel and suggested that they may prepare and submit to me additional authorities that might have been decided since the hearing two years ago on the case itself. They have done so and I have read those briefs. They have also prepared proposed Findings of Fact and Conclusions of Law. I am not satisfied with the proposed Findings of Fact and Conclusions of Law and will prepare my own; the reasons for that I will state. I might parenthetically state that at the conclusion of the trial an agreed set of Findings of Fact and Conclusions of Law were submitted to the court, and as is customary with this court, possibly wrongfully so, I have the feeling that if counsel can agree on findings the court is not going to disturb it, and without paying any attention to them I signed the Findings of Fact and Conclusions of Law. I note that they contained statements as to testimony of individual witnesses, which is improper in Findings of Fact. The Findings of Fact should be made as to the ultimate issues of the case rather than detailing what one witness testified to or the other. That has been corrected in the proposed findings on this occasion.

I do feel that the proposed findings by counsel at this time are a little longer; for instance, in the appellant's proposed conclusions references are made to the matters that were determined as far as constitutionality is concerned, and that was determined in pretrial procedures, motions for summary judgment,

5

and all of that was argued, and there is a basis on appeal to question the court's ruling there. It was not part of the trial itself. That should not be included.

Now, I propose, after going through the testimony and refreshing my mind on it and having strictly in mind the Supreme Court's admonition to me, I come out with the same result as I did before. After all, I think what we have done, and in my thinking possibly, I have stated of course that there were no overt acts of homosexuality shown. I believe the findings that I signed also provided that his efficiency was not affected by the fact that he was, and that his was an elective course that the students didn't have to take. To me, basically, there are two principal issues: One, was Mr. Gaylord engaged in conduct that would come within the definition of immorality; and, two, would it impair his efficiency as a teacher. Number one, we refer to a person being a homosexual; that's one word but that doesn't tell acts of immorality with parties of the same sex, and while we have no definition of the acts that were performed here in my opinion and from the admission of the appellant himself, the fact that the appellant didn't want his parents to know, he was well aware of the fact that it would be considered by people as being immoral conduct. That in and of itself is not enough; the question is would it impair his teaching efficiency and injure the school.

The court, after going through all of the testimony and without giving undue weight to the school administrators

is of the opinion that such conduct, known as such, would impair his teaching efficiency and injure the school. From the standpoint of the pupils the testimony was, and I believe admitted by the appellant, that there would be some students who would not come to his class by pressure of parents or otherwise. He points out that it was an elective, they don't have to come to me, but where you take away a teacher from the school system part time, where part of the school is concerned you are affecting the teaching efficiency. The relationship with the school teachers themselves: there was testimony that it would cause a divisiveness which I would find would be the case amongst the teaching staff. It's part and parcel of the whole school administration and the effectiveness of the school, the working together of the teachers, and I can see where the teaching efficiency would be affected. Insofar as students are concerned, there would be those who would not take his class. That was generally recognized throughout the whole testimony. He was removing himself from one of the teachers who can be selected. From the standpoint of the parents, as mentioned in my decision and in the questions to some of the witnesses, there is no question that the attitude of the parents to the teachers can have it's disruptive effect in the school system itself.

Considering it all, I find and will prepare the findings myself and have them out if not by the end of the week then over the weekend, and submit copies to counsel, and will file the original.

The Court will be at recess.

(Concluded.)

CERTIFICATE OF OFFICIAL COURT REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

I, CAROL A. TALBOTT, one of the Official Court Reporters of the Superior Court of the State of Washington in and for the County of Pierce, do hereby certify that the Statement of Facts in the foregoing cause was ordered by Chris Young, Attorney at Law, on the 3rd day of December, 1975.

I further certify that said Statement of Facts was filed with the Clerk of the Court in the above county on the _____ day of _____, 197___.

_____
Official Court Reporter

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

I, JAMES V. RAMSDELL, one of the judges of the Superior Court of the State of Washington in and for the County of Pierce and the judge before whom the foregoing proceedings were had, do hereby certify that the matters and proceedings embodied in the foregoing statement of facts are matters and proceedings occurring in said cause and that the same are hereby made a part of the record therein.

I do further certify that the same contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein.

DONE IN OPEN COURT this _____ day of _____, 197___.

_____
JUDGE

SECOND FINDINGS OF FACT AND CONCLUSIONS OF LAW BY SUPERIOR COURT, FOLLOWING REMAND

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

JAMES M. GAYLORD,	)	
	)	
Plaintiff-Appellant,	)	No. 215450
	)	
v.	)	
	)	FINDINGS OF
TACOMA SCHOOL DISTRICT NO. 10, JOHN ANDERSON, DAVID TUELL, FRANK GILLIHAN, JAMES L. BOZE, and MICHAEL STERBICK,	)	FACT AND CONCLUSIONS OF LAW ON REMAND
	)	
Defendants-Respondents.	)	

This matter having come on for reconsideration of the evidence upon remand from the Supreme Court of the State of Washington, the entire statement of facts having been read and considered, the appellant being represented by Peterson, Bracelin, Young & Putra, by and through Christopher E. Young, and the respondent being represented by its attorney, Roger J. Miener, deputy prosecuting attorney for Pierce County, having submitted proposed Findings of Fact and Conclusions of Law and additional memoranda on remand, and the court having considered the same

and having in mind the Appellate Court's directions to enter findings of fact based upon the application of the proper statutory burden of proof of the respondent district, does now make and enter the following:

FINDINGS OF FACT

I.

Appellant prior to his discharge on December 21, 1972 had been a teacher at Wilson High School in Respondent School District for twelve and a fraction years.

II.

During this tenure, periodic evaluations of appellant were made as to his teaching and they were all highly favorable.

III.

For approximately 20 years prior to the trial in this case appellant admits homosexual inclinations, and during the last several years he sought out and established contact with others of the same sex and inclination. From appellant's own testimony it is unquestioned that homosexual acts were participated in by him, although there was no evidence of any overt acts having been committed. Appellant recognized that knowledge of this status by his superiors would jeopardize his employment. Appellant also recognized damage to his reputation

should his status as a homosexual be made known. He specifically did not want his parents to know thereof.

IV.

Until October 24, 1972 none of appellant's superiors were aware of his status as a homosexual, nor were any of the students or teachers at Wilson High School aware of this. On this date one Kim Balcom, a former student at Wilson High School reported to the vice principal that he had reason to believe that appellant was a homosexual. In relating his story, which was reduced to a written and signed statement, Balcom said one Frank Rivers, a homosexual friend of appellant, had referred him to appellant for consultation, that he had a meeting with appellant after school and although appellant did not admit to such he felt from his discussion with appellant that he was a homosexual.

V.

On the evening of October 24, 1972, appellant at his home was shown the Balcom statement by the Wilson High School Vice Principal. Appellant admitted his status as a homosexual. He also, in effect, sought to have the matter dropped without it being submitted to higher authority. In this effort he was unsuccessful.

VI.

On November 21, 1972, appellant was notified in writing that the Board of Directors of respondent had found probable cause for his discharge from his duties as a teacher on the basis that he occupied a public status incompatible with the conduct required of teachers, specifically the status of being a publicly known homosexual. The specific ground for discharge is set forth in Respondent's Policy No. 4119 providing for release or dismissal of school employees for "immorality."

VII.

Appellant requested a hearing and such was conducted by respondent before three of the five members of the Board of Directors on December 19, 1972, resulting in the discharge of appellant effective December 21, 1972, on the grounds as previously set forth.

VIII.

That the admitted status of being a homosexual connotes the commission of acts not only immoral in public concept but illegal as well. Sexual gratification with a member of one's own sex is implicit in the term "homosexual." Such acts fall within the proscribed conduct of the crime of Lewdness, RCW 9.79.120 or Sodomy, RCW 9.79.100.

IX.

That while appellant's status as a homosexual unknown to others in the school did not affect his teaching efficiency and injure the school, when it became known publicly that appellant was a homosexual the knowledge thereof would and did impair his efficiency as a teacher with resultant injury to the school had he not been discharged.

X.

A teacher's efficiency is determined by his relationship with students, their parents, fellow teachers and school administrators. In all of these areas the continued employment of appellant after he became known as a homosexual would result, had he not been discharged, in confusion, suspicion, fear, expressed parental concern and pressure upon the administration from students, parents and fellow teachers, all of which would impair appellant's efficiency as a teacher and injure the school.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I.

That this court has jurisdiction over the parties and the subject matter of this appeal.

II.

That appellant was properly discharged by respondent upon a charge of immorality upon his admission and disclosure that he was a homosexual.

III.

That the appeal by appellant from the order of December 21, 1972, signed by three members of Respondent Board of Directors in which appellant was discharged, should be denied, and all relief sought by said appeal should be denied.

Done in open Court this 30th day of December, 1975.

James V. Ramsdell
JUDGE

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-91

JAMES M. GAYLORD,

Petitioner,

v.

TACOMA SCHOOL DISTRICT NO. 10, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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INTRODUCTION

Respondent school district respectfully registers its opposition to the issuance of a writ of certiorari to review the judgment of the Washington State Supreme Court which sustained

petitioner's discharge from employment.

For present purposes, no counterstatement will be offered to petitioner's references to opinions below, statement of jurisdictional grounds, or statement of the questions presented. An objective statement of the case is found in the Washington State Supreme Court opinion printed in the appendix to petitioner's petition at pp. 19a-22a.* (88 Wn.2d 286 at 287-290.)

Petitioner's compilation of statutes must be supplemented to include the statute which was actually utilized as a basis for petitioner's discharge. This additional statute (as of the time of petitioner's discharge and trial), quoted only in pertinent part, is Revised Code of Washington 28A.58.100.

> Directors--Hiring and discharging employees--Leaves for employees--Seniority and leave benefits, retention upon transfers between schools. Every board of directors, unless otherwise specially provided by law, shall:
>
> (1) Employ for not more than one year, and for sufficient cause discharge all certificated and noncertificated employees, . . . ;

*This brief contains no appendix. Instead, utilization is made of the appendix to petitioner's petition with references to be made as "PA-___".

> (2) . . . .

ARGUMENT

The statutory language of "sufficient cause," judicially defined as "conduct which would affect a teacher's efficiency," was deemed by both the majority and the dissent below to be a constitutional basis for discharging a public school teacher. (PA-22a and 32 a. 88 Wn.2d at 290 and 300.)

First amendment and due process rights are protected, because it is conduct, and not simply a person's thoughts, which are in issue. Equal protection, due process, and privacy are safeguarded by the requirement for showing that the conduct in question adversely affects a teacher's efficiency. This "rational nexus" places the school district policy statement warning against "immorality" in its proper context. Whatever may be said of immorality as an abstract term, by coupling it with the necessity for showing actual or prospective adverse performance as a teacher, the challenge of vagueness is squarely met and overcome. Petitioner's first two "Questions Presented" do not provide a sound basis for granting review.

It is petitioner's third "Question Presented" which highlights the true boundaries of the disagreement between the majority and dissent below. Two judges out of eight have evidenced their sincere belief that there is no substantial evidence in the record to satisfy the requirements of what is otherwise conceded to be a constitutionally

valid law. Six judges are satisfied that substantial evidence is present. Presence of substantial evidence is certainly a basic aspect of due process, but here, where a review of the trial court's action has been completed by eight additional judges, it is submitted that the Constitution has been satisfied; that the "process" which is "due" has been rendered. Southern Power Company v. North Carolina Public Service Co., (1924), 263 U. S. 508. General Talking Pictures Corp. v. Western Electric Co. (1938), 304 U. S. 175, 178.

This conclusion is not altered by petitioner's characterization of one aspect of the evidence validation process as being an ex post facto application of a rebuttable presumption. The rule utilized by the majority below is firmly grounded on analagous, antecedent authority. (PA-25a-27a, 88 Wn.2d at 293-295)

CONCLUSION

The law applicable to the discharge of petitioner is secure from challenge on a constitutional basis. All that remains of petitioner's request is an invitation for this court to once again review the record and redetermine whether or not substantial evidence is present. It is respectfully submitted that this invitation should be declined.

Respectfully submitted,

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August 9, 1977